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THE
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~~Indian Appeals :~~
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CASES
IN

THE PRIVY COUNCIL
ON APPEAL FROM
THE EAST INDIES.

REPORTED BY HERBERT COWELL, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. VI.—1878-9

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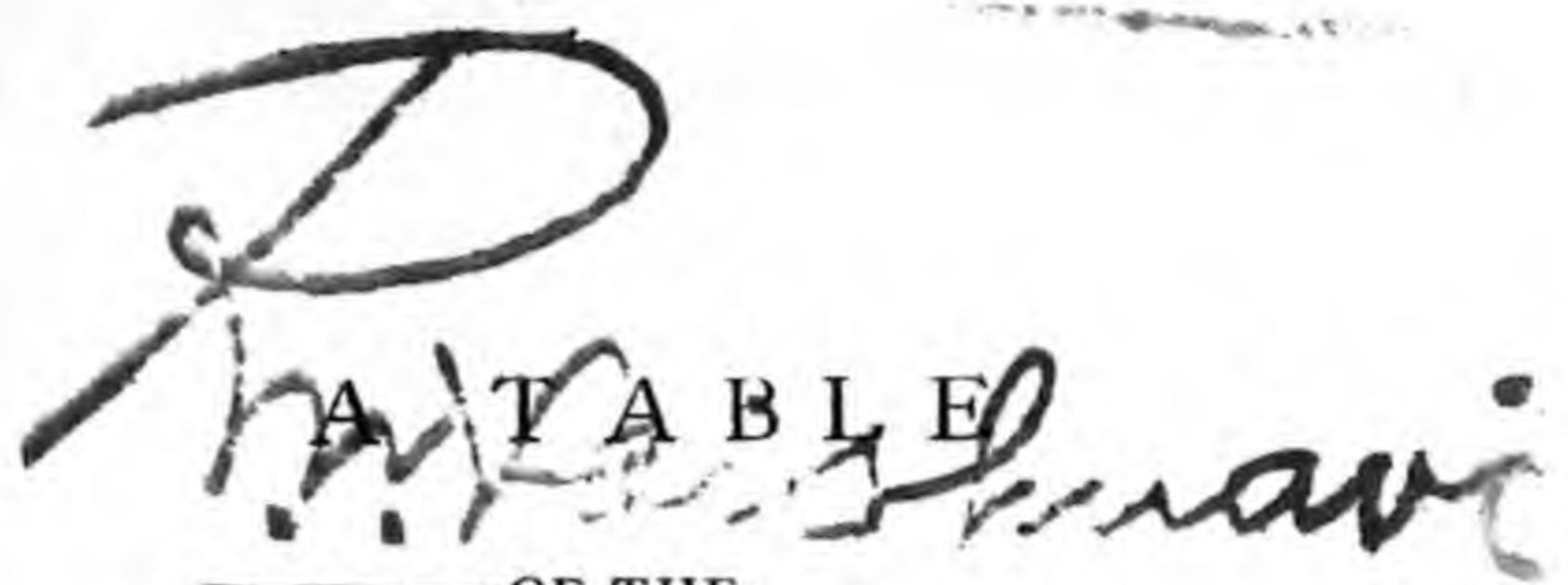
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CASES
IN
THE PRIVY COUNCIL
ON APPEAL FROM
The East Indies.

GOURI SHUNKER PLAINTIFF ; J. C.*
AND 1878
THE MAHARAJAH OF BULRAMPOR. . . DEFENDANT. Nov. 20, 21.
ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.

Oudh Estates Act, 1869—Right of Mortgagee prior to the Confiscation to sub-Settlement—Malikana.

In a suit against a talookdar (originally for the direct settlement of superior proprietary right but subsequently) for a sub-settlement of a sub-proprietary right in four villages (portion of the talook), it appeared that the Plaintiff became mortgagee thereof and of birt zemindary rights therein on the 4th of March, 1856 (*i. e.*, after the annexation of *Oudh*), for four years with possession; that on the 4th of June, 1857, a summary settlement was made with him only up to the time fixed for the redemption of the mortgage; that in 1859 the mortgagor's talook having been confiscated was granted to the Respondent, and the Plaintiff dispossessed in his favour. It appeared also that the transfer to the mortgagee, according to the true construction of the mortgage deed, and having regard to the intentions of the parties, was merely of a sub-proprietary right :—

Held, that the Plaintiff was entitled to such sub-settlement; but without prejudice to the Respondent's right (if any) to malikana at not less than 10 per cent. after the Plaintiff's interest had been perfected by foreclosure.

It is not essential to the enforcement of the rights of one who would

* Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTA-GUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.

1878

GOURI
SHUNKUR
v.
MAHARAJAH
OF BULRAM-
PORE.

otherwise be a subordinate zemindar that the talookdar should have some pecuniary interest in the sub-tenure, or that the zemindar should be bound to pay some substantial rent to his superior.

Quære, whether even if this mortgage did not confer a strictly sub-proprietary interest, a sub-settlement thereof could nevertheless be made.

A Plaintiff seeking by his plaint a direct settlement of a superior proprietary right may modify his claim to one for a sub-settlement of a sub-proprietary right.

Widow of Shunker Sahai v. Rajah Kashi Pershad (1) approved.

APPEAL from a decree (Dec. 5th, 1874), of the Judicial Commissioner of *Oudh*, reversing that of the Commissioner of *Fyzabad* (Aug. 28th, 1873), by which a judgment of the settlement officer of *Gonda* had been reversed and the relief prayed for by the Appellant had been decreed to him.

The main question was as to the right of the Appellant, to whom a mortgage had been executed of certain lands shortly after the annexation of *Oudh* by a talookdar, whose talook was subsequently confiscated by the Government for rebellion and settled with the Respondent, to assert as against the latter his rights as mortgagee.

The facts of the case sufficiently appear in the judgment of their Lordships.

The birt patar dated Phagun Sudi 13th, 1263 Fusli, was as follows :—

“ I, Maharajah *Dirgh Narain Singh*, Rajah of purgannah *Tulsi-pore Terai*, do hereby declare that I have borrowed Rs.7001 (seven thousand and one) current coin from *Gauri Shanker Tewari*, zemindar of village *Kamsar Tappa Bodhai*, purgannah *Ratoupar Bansi*, and in lieu of the same made a conditional sale to him of the villages *Bijwa Kalan*, *Bairwa*, *Bimha* and *Katiha Bhairi*, talooka *Bhanbhar*, in the aforesaid purgannah, with all the four boundaries and birt zemindary rights, for the period of four years commencing from Phagun Sudi 13th, 1264 Fusli, and ending on Phagun Sudi 13th, 1267 Fusli. The above-named creditor is allowed to take possession of the aforesaid villages, to pay the Government revenue, and to appropriate the surplus profits to his use in lieu of interest. Neither will I have any claim to profits,

nor will the creditor have any claim to interest. I shall be entitled to get back the deed when I pay the money at the stipulated period. I have, therefore, executed this deed in order that it may be of use at the time of need."

J. C.

1878

—
GOURI
SHUNKUR

v.

MAHARAJAH
OF BULRAM-
PORE.
—

The plaint was as follows :—

" Claim to proprietary right as mortgagee in *Bijwa Kalan, Tappa Bhanbhar*, included in *Tarsa*, purgannah *Tulsipore*. *Rajah Dirgh Narain Singh*, proprietor of *Tulsipore*, mortgaged the village *Bijwa Kalan* in talooka *Bhanbhar*, purgannah *Tulsipore*, to the Plaintiff, in 1263 Fusli, for a period of four years in lieu of Rs. 7,001. In 1264 Fusli the settlement of the village was made with Plaintiff as mortgagee. The Plaintiff held possession up to 1265 Fusli, but the above Defendant dispossessed Plaintiff in 1266 Fusli. As the regular settlement is in progress, Plaintiff prays that the regular settlement be made with him. Dated 17th October, 1870."

The judgment appealed from and dated December the 5th, 1874, was as follows :—

" This case was remanded for the trial of certain issues, the principal one being framed with a view to determine the nature of the title conveyed to Plaintiff under his deed, which forms the basis of his claim. The conclusion at which I arrive is, that had this deed been executed prior to the annexation of the province the introduction into it of the words "birt zemindary" would have conveyed the meaning that the mortgagee agreed to hold the property mortgaged in subordination to the mortgagor, or, in other words, that he consented to the mortgaged villages being retained in the mortgagor's kabuliat instead of his entering into direct engagements with the Government officials for the revenue of such villages. But as the deed was executed subsequent to the annexation of the province by the British Government, and at a time when the policy was to do away with talookdars, and to deal with the village occupants as independent proprietors, and considering also that immediately after the execution of the mortgage the Plaintiff demanded and was admitted to direct engagement with Government for the land revenue due on the mortgaged villages, I can but conclude that the nature of the title intended

J. C. to be conveyed under the deed was the full proprietary title, and
 1878 not merely the subordinate and dependent title of birtia. This
 — GOURI being so, and it being admitted that Plaintiff was in possession
 SHUNKUR of the villages mortgaged at the time of the promulgation of
 v. A^H MAHARAJ the proclamation confiscating, with a few exceptions, the entire
 OF BULRAJ^M PROP. proprietary right in the soil, it follows that Plaintiff's came within
 — the scope of the proclamation, and that this title, he temporarily
 representing his mortgagor, was by that proclamation swept away.
 It may be that the provisions of Act IX of 1859, are not applicable
 to the case, as the rights of the mortgagor were not confiscated by
 any special order, consequent on his conviction of an offence, but
 at the same time it seems clear to me that the effect of the con-
 fiscation order was to sweep away the proprietary title both of the
 mortgagee and the mortgagor, and to leave the former without
 any security for the debt due by the latter. It cannot for a
 moment be contended that if at the time of confiscation landed
 property was hypothecated for a debt due by its owner, the person
 on whom the property was conferred by Government became
 liable for that debt. During the many years that Settlement
 Courts have been open and claims of all kinds have been preferred,
 no such claim as this has ever to my knowledge been put forward.
 In fact the Plaintiff himself at the time fully understood and
 acquiesced in the consequences of the Government Act of confis-
 cation, for when he was removed from possession and the villages
 were made over to the Defendant, he preferred no claim to retain
 possession of his villages, as mortgagee, but he simply asked to
 be allowed a preferential claim as lessee. It was urged that the
 Plaintiff by claiming the superior title is not debarred from as-
 serting a claim to a subordinate title, and reference was made to
 the case of the *Widow of Shunker Sahai v. Rajah Kashi Pershad*¹ ;
 but the facts of this case do not correspond with those of the case
 quoted. In the first place Rajah *Kashi Pershad* was one of the
 few proprietors whose rights were exempted from confiscation and
 in the next, the Lords of the Privy Council say they "can see no
 reason why the Appellant, because she may have originally claimed
 the superior, should not be allowed to assert in this suit any sub-
 ordinate right to which she may be entitled." But I have held

that Plaintiff is not entitled to any subordinate right, his connection with the property in suit being that of a mortgagee of the superior right. The Plaintiff's claim is not in my opinion maintainable, and I must therefore reverse the order of the Commissioner."

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Doyne, for the Appellant, contended that the Judicial Commissioner was wrong in holding that the interest for the Appellant was that of a mortgagee of the superior right. In point of fact it was of a subordinate right, and he asked by his plaint to have his subordinate right recognised. The Judicial Commissioner was clearly wrong in holding that the superior right passed to the Appellant "because the policy of the British Government was to do away with talookdars." The annexation of *Oudh*, which carried out whatever might have been the policy of the Government, had no bearing on the intention of the parties to the mortgage; and neither that annexation, nor the supposed change of policy as to treatment of talookdars, could have any effect in changing the character of that instrument, or affecting the rights of the parties thereto *inter se*. But even if the instrument conferred on the Appellant the rights of a mortgagee of the full proprietary rights, such rights would, upon regrant by the government, be protected under the last clause of sect. 3 *Oudh Estates Act, 1869*, and the letters there referred to, even as against a sunnud-holder whose name appeared in the proper list under sects. 8, 9 and 10. The case of *Musst Thukratin Sookraj Koer v. The Government*¹ is in favour of the Appellant. [SIR ROBERT P. COLLIER:—That is a wholly different case. It was not there said that the whole property was not confiscated. SIR JAMES W. COLVILE:—In that case the trust was created after confiscation.] Upon the evidence the Respondent has not shewn that he has any sunnud, or been included in any list as to *Tulsi-pore*, or had any settlement made with him by the Government in 1859, which would interfere with the Appellant's rights as mortgagee. The fair presumption arising from the evidence is, that the Government, which in 1856 acknowledged by settlement the rights of the Appellant as mortgagee, intended when settling *Tulsi-pore* with the Respondent to confer, and it did confer, no

J. C. larger rights upon him than would have been granted to Rajah
 1878 *Dirgh Narain Singh*, the mortgagor, had he lived, and a settlement been made with or sunnud granted to him.

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MAHARAJAH *v.* *Leith, Q.C.*, and *Craham*, for the Respondent, contended that
 OF BULRAM- the proclamation of Lord *Canning* destroyed all proprietary rights,
 PORE. — and that the Appellant was the holder of full proprietary rights,
 and not of a subordinate tenure. The case was not brought by
 anything in evidence within sect. 3 of Act I of 1869, nor was the
 Appellant protected by anything in that Act or the letters annexed
 thereto. His interest was not that of the class of under-proprietors
 thereby protected ; it was not intermediate between the ryots and
 the talookdar. An application had been made by the Appellant to
 pay revenue direct to the Government ; and there cannot be a sub-
 proprietary interest vested in the Appellant unless he holds of the
 Respondent by a tenure in respect of which he pays rent or service
 to him. Here the Respondent had no beneficial interest in the
 villages, assuming a foreclosure to have taken place. [SIR BARNES
 PEACOCK :—Although the Plaintiff pays nothing to the talookdar,
 he may yet be intermediate. He is authorized by the talookdar
 to take the rents from the ryots and pay them to the Government.
 Instead of paying the balance to the talookdar, he keeps it in pay-
 ment of interest on his own debt. The talookdar gets the benefit
 of the arrangement, and has a beneficial interest.] But the state
 of things is different here. This was a conditional sale. The birt
 zemindar was not a lessee or a tenant, but, subject to the right of
 the mortgagor to redeem, he was owner. Neither sect. 3 of Act I
 of 1869 nor Act XX of 1866 contains any provision for the
 state of things which has arisen here, even if the Appellant
 be considered under-proprietor. The case in 14th *Moore* was a
 case of express trust : *Widow of Shunker Sahai v. Rajah Kashi
 Pershad* (1) was a case of an excepted talookdar, and similar to this.

Doyne, in reply, referred to *Widow of Shunker Sahai v. Rajah Kashi Pershad* (2) as to the position of the talookdar. The government revenue being paid through the talookdar indicates that the superior proprietary right is with him.

The judgment of their Lordships was delivered by
SIR JAMES W. COLVILE :—

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The broad question raised by this appeal is whether the Plaintiff is entitled to any and what rights in four villages which must be taken to be parcel of the talook of *Tulsipore*, of which the Defendant, the Maharajah of *Bulrampore*, is now the proprietor as talookdar within the meaning of the *Oudh Estates Act* No. I, of 1869,

The estate of *Tulsipore* was formerly the property of one *Dirgh Narain Singh*, who, it is said, was at the time of the first capture of *Lucknow* during the mutiny a rebel, and imprisoned in the residency, and afterwards went, still in custody, to the *Alumbagh*, where he died. His heirs continued in rebellion, and the result was that in 1859 the estate of *Tulsipore* was created into a talook under the new system, in favour of the Maharajah of *Bulrampore* who was allowed to engage for the revenue as talookdar at the summary settlement of that year. His title has since been confirmed in the fullest manner by the *Oudh Estates Act*, and therefore it must be taken for granted that he is talookdar of all the villages for which he then settled, as included in the talook of *Tulsipore*.

The title of the Plaintiff arose in this way : The former Rajah of *Tulsipore* on the 4th of March, 1856, a very few weeks after the first annexation of *Oudh*, borrowed from the Plaintiff a sum of Rs.7,001, and, as a security for that sum, executed to him the instrument in the nature of a mortgage by way of conditional sale, which is set out above. That instrument, after declaring that he had borrowed this money, and that in lieu of the same he had made a conditional sale to the Plaintiff of the four villages in question, with all the four boundaries, and birt zemindary rights for the period of four years, commencing from the 4th of March, 1856, and ending on the 4th of March, 1860, goes on to say, "The above-named creditor is allowed to take possession of the aforesaid villages, to pay the Government revenue, and to appropriate the surplus profits to his use in lieu of interest. Neither will I have any claim to profits, nor will the creditor have any claim to interest. I shall be entitled to get back the deed when I pay the money at the stipulated period."

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At the summary settlement which the British Government proceeded to make upon the first annexation of the province, the Plaintiff, the mortgagee, applied to have the settlement of these four villages made directly with him. That settlement was not completed until the 4th of June, 1857,—a period very shortly antecedent to that at which British rule ceased for a time in the province of *Oudh*; and, when made, was made to endure only for the time during which the Plaintiff would be in possession of the villages strictly in the character of mortgagee, that is, only up to the time fixed for the redemption of the mortgage. Then came the mutiny. After that came Lord Canning's proclamation of the 15th of March, 1858, the effect of which has been so often discussed here that it is not necessary more particularly to refer to it. Early in 1859 the Government, having apparently retained during the intermediate period this estate of *Tulsipore* under some kind of attachment, finally determined to grant it to the Respondent. The sunnud, if any, granted to him is not upon the Record, but it is established that he was admitted to engage for the revenue on the 21st of January, 1859, and that the settlement was completed on the 25th of the following May. The Plaintiff, who was in actual possession of the villages as mortgagee, was dispossessed on the 31st of January, 1859, when, in anticipation of the final settlement, the Maharajah of *Bulrampore* was put in possession. The Plaintiff subsequently made various attempts to assert his rights, and to recover possession, with which we have on the present occasion no concern; and on the 15th of May, 1866, he was referred to the regular settlement which was afterwards to be made, and told that he must prefer any claim which he could substantiate at that settlement. Accordingly in October, 1870, when the settlement was in progress, he filed his plaint in the present suit.

The Plaintiff in terms, asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. On the 3rd of March, 1873 the claim was dismissed by the assistant settlement officer, who treated it apparently as one for the direct settlement of a superior proprietary right, and held that, as such, it was barred by the *Oudh Estates Act*, and the rights which the talookdar had acquired. There was an appeal to the Commissioner of the district, Mr. Capper, and before him the suit

assumed the character of one for a sub-settlement of a sub-proprietary right, which it has ever since retained. That it is competent to the Courts to allow a Plaintiff so to modify his claim, was ruled by their Lordships in the case of the *Widow of Shunker Sahai v. Rajah Kashi Pershad* (1).

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Mr. *Capper*, in his judgment of the 10th of May, 1873, ruled that the mortgagee, if his title were perfected by foreclosure, would be the legal owner of birt zemindary rights subordinate to the talookdar ; but that the mortgage was still redeemable. He thought, however, that the case was not ripe for decision, and remanded it for the trial of an issue whether the Plaintiff had got possession of all or any of these villages prior to Phagun 1267 Fusli. This issue was found in the affirmative ; and the fact was not disputed by the Respondent when the case came back to Mr. *Capper*. Mr. *Capper*, on the 28th of August 1873, then made a decree in these terms : " The Court orders and decrees the appeal and cancels the decree of the 3rd of March, 1873. *Gouri Shunker*, Plaintiff, and his co-sharers, if any, are decreed an under-proprietary zemindary title in mouzah *Bairwa*, mouzah *Bijwa Kalan*, mouzah *Bindhwa*, and mouzah *Katya Bhari*, and possession under the terms of the deed of conditional sale dated Phagun Sudi 13th, 1263 Fusli, till such time as the lien shall be redeemed, or till the title shall be perfected by foreclosure." The Respondent then appealed from this decree to the Judicial Commissioner, Mr. *Currie*. That officer, on the hearing before him of the 31st of March, 1874, seems to have objected to the decision of Mr. *Capper* on the ground that he had assumed what ought to have been proved. He said, " It is very material, for a proper determination of this case, that the exact nature of the title intended to be conveyed under the deed should be decided. The Defendant urges that the title intended to be conveyed was the full proprietary title, and this view of the case is supported by the fact that this suit is laid for the full proprietary title. On the other hand, the Plaintiff urges that the deed never intended to convey to him more than an under-proprietary title, that is, a title as birtia, the wording of the deed being 'with all the rights attaching to a birt zemindary.' " He accordingly sent the case down to the Settle-

J. C. ment Officer, that is the Judge of first instance, for the investigation and determination of two issues : the first was, "What is the meaning of the term 'with all the rights appertaining to a birt zemindary' in the mortgage bond on which the Plaintiff bases his claim." The second was as to the date and circumstances of the seizure by the Government of the villages as part of the property of the rebel Rajah of *Tulsipore*. Nothing, however, ultimately turned upon the finding upon this issue, which was in accordance with the facts already stated.

Examination of Plaintiff

On the first issue a number of witnesses were examined before the lower officer. He, upon that evidence, whilst professing that he knew very little himself about these tenures, came to the conclusion "that the deed pledged the proprietary title in these four villages; that it was intended that the mortgagee should hold independently for the four years named; and that at the end of that period, on failure to redeem, the Plaintiff would have become the independent proprietor of the property." And he accordingly found on the first issue that the meaning of the words, "with all the rights appertaining to a birt zemindar," did in this case signify independent proprietary possession, and not a right of property to be held in subordination to the talookdar.

The case, with these findings and the evidence on which they were based, went back to the Judicial Commissioner, who then made the decree which is the subject of the present appeal. He dismissed the suit upon the grounds stated in his judgment.

Before considering those grounds in detail, it is desirable to observe, that the Judicial Commissioner seems to have agreed with the Commissioner, Mr. *Capper*, that if the effect of the mortgage was to create a tenure subordinate to that of the talookdar, the claim of the Plaintiff to a sub-settlement would be valid. The question upon which the determination of the suit thus depended was that which was principally argued here, namely, what was the nature of the estate conveyed by way of conditional sale; that is, whether, supposing the mortgage deed to have become absolute, the Plaintiff would have held the villages from that time as an independent zemindar, or as a zemindar in some sense subordinate to the talookdar, the villages remaining in that way parcel of the *Tulsipore* estate.

It need hardly be said that if the Judges in *Oudh* had given a clear interpretation of the words "birt zemindary," their Lordships would have been very slow to question that interpretation, or even to draw from the evidence any inference other than that which those who are acquainted with the tenures of the province had already drawn. Mr. *Capper*, an experienced officer, assumed that the words "birt zemindary," import a subordinate tenure. From the first part of the final judgment of the Judicial Commissioner, it seems that he would have understood the words in the same sense if they had stood alone. He says, "The conclusion at which I arrive is that had this deed been executed prior to the annexation of the province, the introduction into it of the words 'birt zemindary' would have conveyed the meaning that the mortgagee agreed to hold the property mortgaged in subordination to the mortgagor, or, in other words, that he consented to the mortgaged villages being retained in the mortgagor's kabuliat, instead of his entering into direct engagements with the Government officials for the revenue of such villages." He then goes on to consider how this construction of the words ought to be affected by a consideration of the surrounding circumstances under which the deed was executed, and the probable intention of the parties, and he proceeds, "But as the deed was executed subject to the annexation of the province by the British Government, and at a time when the policy was to do away with talookdars, and to deal with village occupants as independent proprietors, and considering also that immediately after the execution of the mortgage the Plaintiff demanded and was admitted to direct engagement with Government for the land revenue due on the mortgaged villages, I can but conclude that the nature of the title intended to be conveyed under the deed was the full proprietary title, and not merely the subordinate and dependent title of 'Birtia.'" There are therefore two reasons assigned for the conclusion to which he came, and neither of them, in their Lordships' judgment, appears to be satisfactory. The deed, no doubt, was executed subsequent to the annexation of the province, but there is no reason to suppose that, at the time it was executed, the parties were at all aware of what the future policy of the Government, when it came to change the fiscal arrangements of the Nawab, would be, for that policy at

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J. C. that time had not even been declared ; and therefore it is unreasonable to suppose that the parties contracted with reference to a system under which the Government would make the new settlement with the village occupants as independent proprietors. Then again, their Lordships think that little, as to what the intention of the parties at the time may have been, can be inferred from the fact that after that policy had been declared, and the Government proceeded to make summary settlements with the immediate possessors of villages, and in fact adopted the policy of breaking up the great talookdary estates, the mortgagee did go in under that system to settle for the revenue of these villages. It was, after all, a mere fiscal arrangement ; and the very terms of the settlement which he did make treated his interest as a defeasible interest, and confined the summary settlement made with him to the period which the mortgage had to run before it became redeemable. Their Lordships cannot attach much weight to the statement which he then made, and which is not in the terms of the mortgage deed, as to what his rights would be had not redemption take place. The Judicial Commissioner, however, having for these insufficient reasons come to the conclusion above stated, held that the Plaintiff being in possession of the villages at the date of Lord *Canning*'s proclamation under a title which would give him the full proprietary right in the soil, when and if his mortgage became absolute, fell within the scope of the proclamation ; and that his title was by that proclamation swept away, and was not set up again by the subsequent explanation of the proclamation which is contained in the two letters annexed to Act I of 1869. Everything in this decision, therefore, turns upon the correctness of the finding, that the intention of the parties was to pass the full proprietary title in the event of the mortgage not being redeemed at the proper time, and that there was therefore no sub-proprietary right in the villages as included in the talook settled in 1859 which could be the subject of a sub-settlement. Their Lordships have already intimated that they are not satisfied with the reasons which the learned Judge gives for his construction of the instrument, or rather for the qualification of that which he would understand to be imported by the words "birt zemindary right," by reason of the particular circumstances of the case : and in their

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own opinion it is highly improbable that the intention of the parties when the contract was made was such as is imputed to them. They do not think it likely that the Maharajah (the mortgagor) at that time contemplated the impossibility of his redeeming the mortgage ; or that, if he did, he intended in such an event to lose that influence and power and consideration which the great landowners of *Oudh* derived from the inclusion of subordinate zemindaries in their own talooks ; and if the words "birt zemindary," as seems to be admitted, may import the transfer of merely a sub-proprietary right, their Lordships conceive that to be in this case the more rational construction to be put on them. And it is in their opinion a strong argument in favour of this construction that it makes all the subsequent acts of the Government and the parties which have led to the inclusion of these villages in the talook of *Tulsipore* consistent with reason and justice. It is clear that the Government did not intend to grant anything except that which was properly and legitimately part of the estate of the rebellious Rajah of *Tulsipore*. It is also clear that as Lord Canning's proclamation had then been explained and was understood, the Plaintiff, if he had acquired the absolute interest as zemindar in these villages, and if the villages were thus wholly severed from the talook, would have been allowed to engage for the revenue, not as talookdar, but as independent zemindar. Nevertheless, the villages when the settlement was made were treated as part of *Tulsipore* ; and were accepted by the Maharajah as part of his talook. He had no other title to them except the grant of the estate of *Tulsipore* ; and it is more reasonable to conclude that they were properly so included, than to say that by mistake the Government took property which belonged to another man, put it into an estate to which it no longer belonged, and that by reason of the *Estates Act* and the other proceedings which have taken place a wrong has been done which is now irremediable.

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Their Lordships will now deal with an argument which was much pressed, viz., that there can be no sub-proprietary right unless there be a substantial rent or service to be rendered by the sub-proprietor to the talookdar, and that in this case all that could be paid by the mortgagee after foreclosure would be the Government revenue assessed upon these villages, without giving the Rajah

J. C. any beneficial interest in the collections of the villages. This
 1878 objection does not appear to have occurred either to Mr. *Capper*
 — GOURI or to Mr. *Currie*; nor was it treated as an objection in the case
 SHUNKUR already referred to in Law Rep. 4 Ind. Ap., in which a sub-settle-
 v. MAHARAJAH ment was granted to a lady who does not appear to have paid
 OF BULRAM- anything to her former co-sharer in the estate (as he in fact was)
 PORE. — in respect of the four villages of which she was found to be sole
 proprietor. Nor do their Lordships find, either in the letters of
 Lord *Canning* or in the rules annexed to Act XX of 1866 anything
 which necessarily imports that it is essential to the enforcement of
 the rights of one who would otherwise be a subordinate zemindar,
 that the talookdar should have some pecuniary interest in the
 sub-tenure. Those rules, and some expressions in the letters, no
 doubt, contemplate that in the ordinary case of a sub-tenant he
 would pay something to the superior lord. Their Lordships, how-
 ever, do not find that those provisions are exhaustive, or that
 there are any negative words which say that there shall not be a
 sub-settlement of a subordinate zemindary included in a talook,
 unless the zemindar is bound to pay some substantial rent to his
 superior.

It might be open to consideration whether, if this were not in
 the strict sense of the term a sub-proprietary interest, the case in
 Law Rep. 4 Ind. Ap. would not have justified a sub-settlement of
 it. It is not necessary, however, for their Lordships to go that
 length in the present case. It is sufficient for them to say that
 upon the whole they think this grant of the birt zemindary
 interest should be treated as the conveyance of a subordinate
 zemindary interest; that the villages were at the time of the
 settlement properly treated as still included in the talook of
Tulsiपore settled with the Respondent, and therefore that that the
 judgment of Mr. *Capper* declaring the right of the Plaintiff is
 correct.

The only doubt their Lordships entertain is, whether that
 decision has fully and completely satisfied the terms of Act XX
 of 1866 by giving to the Maharajah the right which that statute
 seemed to contemplate that the talookdar shall always have, viz.,
 that of receiving a malikana of not less than 10 per cent. That
 malikana was given in the former case to which their Lordships

have already referred. It is not very clear whether Mr. *Capper* assumed that the amount of this malikana would be afterwards fixed when the interest of the Plaintiff should cease to be a mortgage interest, and be perfected by foreclosure.

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Their Lordships think that in recommending to Her Majesty (as they propose to do) to allow the appeal and to confirm the decision of Mr. *Capper*, they should also recommend that the order should declare that it is without prejudice to the right, if any, of the Maharajah to malikana at a rate not less than 10 per cent., and that he is to be at liberty to apply to the Courts below for the settlement of such malikana as he may be advised. The costs of the appeal must follow the result.

Solicitor for Appellant : *T. L. Wilson.*

Solicitors for Respondents : *Young, Jackson, & Co.*

CHOTAY LALL DEFENDANT ; J. C.*

AND

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CHUNNO LALL AND OTHERS PLAINTIFFS. Nov. 22, 23

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Jains—Absence of Proof of Customs—Mitakshara Law—Daughter's Inheritance from her Father is not Stridhun.

The ordinary Hindu law of inheritance is to be applied to Jains, in the absence of proof of special customs and usages varying that law.

Sheo Singh Rai v. Mussumut Dakho and another (1) approved.

Under the law of the Mitakshara a daughter's estate inherited from the father is a limited and restricted estate only and not stridhun. Upon her death the next heirs of her father succeed thereto.

APPEAL from a decree of the High Court (Sept. 1, 1874) affirming a decree of the same Court in its ordinary original civil

* Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTA-GUE E. SMITH, and SIR ROBERT P. COLLIER.

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jurisdiction (April 9, 1874), whereby it was declared that the two first Respondents, as heirs of one *Thakoordass Baboo*, intestate deceased, were entitled to the estate and effects of which the said intestate died possessed of or entitled to.

The facts are stated in the judgment of their Lordships; the question in the appeal being whether the Appellant, as the husband of the deceased's daughter, married in the Brahma form of marriage, or the Respondents (the deceased's brothers' grandsons) were on the death of the daughter, who had survived her father, entitled to succeed to the estate.

The judgment of the High Court (*Couch, C. J. and Ainslie, J.*) was as follows :—

"The Plaintiffs in this suit are the grandsons of *Thakoordass*, who was admitted to be a native of the *North-Western Provinces*, and had come down to *Calcutta* and acquired the property which is in dispute. He died in *Calcutta* in February 1860, intestate, and without having relinquished the law of his birth-place. He left a daughter, *Lucky Bibee*, who was five years old at the time of his death, and subsequently intermarried with the Defendant *Chotay Lall*, and died in September 1872, without issue. He also left a brother's son, named *Inder Chand*, who died in May 1871, intestate, leaving the Plaintiffs his only sons and heirs. Mr. Justice *Pontifex*, by whom the case was heard, held that the estate which the daughter *Lucky Bibee* took on the death of her father was only a qualified one, and that, on her death the Plaintiffs, as heirs of her father, became entitled to the property in dispute. And upon the case being sent back by me and Mr. Justice *Macpherson*, before whom it came in the first instance, to try the issues which had been raised, the first of which was, was *Thakoordass* a Jain? and the second, if so, what is the law of succession applicable to Jains? the learned Judge found that the case should be decided according to the law of the *North-Western Provinces*. We have therefore to determine whether according to that law the decision of the learned Judge is right.

"The first authority on the subject that I am aware of, is *Mussumat Gyan Koowur v. Dookharn Singh* (1) in which it was held

that by the Hindu law (if being a case from *Behar*) a daughter has no power to alienate by gift her ancestral property to the detriment of the other heirs of her father. The reply of the Hindu law officers of the Court, who were asked to declare according to the Mithila and Western schools of law, 'Whether *Gyan Koomur* (the daughter) as competent to bestow the estate in gift on *Joga Koomur*; and, if not, who was entitled to the estate on her decease?'—which is the very question in this case,—was, 'When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and therefore the daughter, whose right of inheritance is weaker, that is, who only succeeds on failure of the widow, *a fortiori* can have no such right. Now it appears from the decree of the Sudder Dewany Adawlut, dated 6th of October, 1814' (this is the fact which applies particularly to the present case) 'that the property in question is ancestral, and not *Gyan Koomur's* peculiar property (Stridhan), and also it seems from the deed of gift that such gift was not made for religious purposes. According, therefore, to the law as current both in Mithila and the West, the deed is invalid; such being the case, the property will go, after her death, to the nearest heir of her father, *Kehur Singh*, then living. For as in the case of the widow, the property goes, on her decease, not to her heir, but to the nearest heir of her husband who may be then living, so the same rule is to be observed *a fortiori* as regards the daughter.'

"The next decision on the subject is in Select Reports, p. 301, *Sheo Sehai Singh v. Mussamut Omed Konwur* (1) in a suit relating to the same property. It was held that there being a sister's son's son and a daughter, the former succeeded and that *per capita* and not *per stirpes*.

"The Court in their remarks say:—There is no doubt that the sister's son's sons were very distant indeed in the order of succession, and, in fact, are not included among the heirs by almost the whole of the Hindu legal authorities. As, however, under no circumstances can the daughter succeed to ancestral property inherited by her mother, the Court considered, under the Vyavasthas

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of the Pundits, that the Plaintiffs had the better right to the estate of *Kehur Singh*, the common ancestor of the parties.'

" We have next a decision of the Sudder Court, *Heeralall Baboo v. Mussumut Dhuncoomary Beebee* (1), where it was held that the estate of a Hindu proprietor, having devolved on his three daughters qualified to succeed him, they held the property during lifetime only, and not as their stridhan ; that so long as any one of the daughters survived, no daughter's sons could inherit ; and that has no son survived when all the three daughters died, the Plaintiff, as heir of the deceased proprietor, succeeded to the estate.

" The decision in this case appears to have been founded upon a passage in Sir *William Macnaghten's* work, p. 22, where he says ' But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue male. According to the law as received in *Benares* and elsewhere, it does not go, as her stridhun, to her husband or heir ; and according to the law of *Bengal* also, it reverts to her father's heirs.'

" The two decisions in the *North-Western Provinces*, reported, one in the 2nd volume of the *Agra* High Court Reports, p. 166, and the other in the 1st volume of the *Allahabad* Reports, p. 114, do not seem to me to be in point on this question : but in *Punchanund Ojhab v. Lalsha Messer* (2), we have a decision of this Court in the case of a mother inheriting from her son. The learned Judges held that on the death of the mother the property went to the heirs of the son, and they said that the rule was the same in the case of a woman inheriting from her father.

" More recently there are two decisions in this Court, one of them by Mr. Justice *Phear* and Mr. Justice *Ainslie*, and another by Mr. Justice *Phear* and Mr. Justice *Morris*, the first *Deo Pershad v. Lujoo Roy* (3) and the second *Dowlat Kooer v. Burno Deo Sahoy* (4), in which the same law is laid down.

" In the High Court at *Madras* the same question as we have before us, arose in the *Shivagunga Case* (5). There the

(1) Beng. S. D. A. (1862), p. 190.

(3) 20 Suth. W. R. 102.

(2) 3 Suth. W. R. 140.

(4) 22 Suth. W. R. 54.

(5) 6 Madras H. C. R. 310.

Chief Justice and Mr. Justice *Holloway* held that the daughters of the first Defendant (that is, the person who had inherited from her father, the suit being brought in her lifetime for a declaration of title) were not her rightful successors to the zemindary, and that the Plaintiff as the eldest grandson of the istimrar zemindar, was entitled to be, preferably to the second Defendant, declared reversionary heir to the zemindary on the death of the first Defendant. Sir *Colley Scotland*, the Chief Justice said :—‘ With respect to the second question raised by the Appellants’ objection to the declaration of the Plaintiff’s right whether the zemindary is the stridhanam property of the first Defendant, I need not add anything, as my conclusion on the first question is obviously decisive of it. But I ought perhaps to say with reference to the arguments (contradictory to those on the first question), advanced on behalf of the Appellants, that the authorities do not, I think, present any ground for them. There are some texts and comments recognising as stridhanam paternal property devolving on a daughter, but they appear to me to relate only to an *appointed* daughter who was declared to become by the appointment the third description of son The fundamental principle of the law of succession, too, is adverse to the contention of the Appellants, for if paternal property passing to a daughter were to become her stridhanam, the succession would pass away from those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner.’ Mr. Justice *Holloway* rested his judgment upon the same grounds. Towards the end of it, he said :—‘ On the question whether property coming to women by inheritance is stridhanam or not, I do not consider it of the least consequence for the decision of this case to determine. By calling it stridhanam we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of stridhanam are transmitted in very various ways I will shortly sum up the grounds upon which I came to the conclusion that the decree of the Civil Judge ought to be affirmed.’ The learned Judge then states the grounds to be :—

‘ 1. The principle of the law is to determine the descent by the nearness nor remoteness of connection with the offering ; there is no taking by or through or by virtue of any individual, the only

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effect of relationship is to connect with that offering ; the very name sapinda is the clearest etymological proof of the predominant notion. 2. That this principle is the reason for the daughters taking at all. 3. That neither in this nor in any other case has, what is called, vesting, the slightest influence ; the very notion of heritable blood is, as applied to Hindu law, meaningless. 4. The principle of the law is the only safe ground for deducing a rule of descent ; the attempt to argue from subordinate propositions will, as the cases shew, lead to a departure wider and wider from the real reason of the law.' As far as the law in that part of *India* is the same as in the *North Western Provinces*, this is an express authority upon the question before us.

" On the other hand, there are certain cases in the High Court at *Bombay* which were relied upon as being opposed to the doctrine which appears to have been consistently held both by this Court and the High Court at *Madras*. One of them is in 1 *Bombay* H. C. Rep., 130, and is known by the name of *Devkuvar Bai's Case*. It appears to have been there laid down by the Supreme Court at *Bombay* that a widow is entitled to the moveable property absolutely, and to the immoveable property for life, and subject to the widow's interest, the immoveable property descends to the daughters absolutely.

" It appears from the judgment of the Chief Justice, Sir *Mathew Sausse*, and Sir *Joseph Arnould*, in *Vinayak Anandram v. Lakshmi Bai* (1), that this decision was based mainly on the authority of the *Mayukha* an authority in that part of *India*. The judgment in the latter case, which seems to have been written by Sir *Mathew Sausse* to be forwarded to the Privy Council, contains this passage (2) : " In *Devkuvar Bai's Case*, this Court held that the widow of an intestate, childless, and separated brother takes the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favour of the widow. In the *Mitakshara* on Inheritance (Ch. II. sect. 1) entitled ' right of the widow to inherit the estate of one who leaves no male issue,' the commentator after

declaring the order of succession (see paragraph 2), in words quoted from *Yajnavalkya*, and after discussing various interpretations and opinions, states the conclusion (paragraph 39) as follows :—[the learned Chief Justice then quotes the passage. He is speaking of his own judgment in the former case and says that he based it on the authority of the *Mayukha*.]

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“ The next case at *Bombay* is *Navalram Atmaram v. Nandkishor Shivnarayan* (1). There three of the learned Judges of that Court held that according to the Hindu law of inheritance as received in the *Bombay* Presidency, immoveable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of stridhan, descends on her death to her own heirs, and not to her father's descendants, according to what is called the “ melancholy succession ;” and that an inheritance descending on a married woman from her father classes as stridhan and descends accordingly.

“ It is to be remarked upon this decision that the learned Judges considered the text of *Menu* and the opinions of the commentators and other authorities on Hindu law, but they do not appear to have been aware of (at least they do not notice) any of the decisions of the Courts on this side of *India* on the subject : and in considering whether we should treat this case as an authority, this is very material. We may fairly say that a judgment of another High Court in which no notice was taken of the decisions of this Court upon the point, ought not to receive the same respect from us as it would receive if the learned Judges had considered the decisions on this side of *India*.

“ The next case is *Bhaskar Trimbak Acharya v. Mahadev Ramji* (2) in which Sir Joseph Arnould, who was one of the Judges in the former case, sat alone. He held that the property acquired by a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as stridhan, and descends accordingly. He appears to have held this upon the authority of *Vinayek Anandram v. Lakshmi Bai*. He says :— ‘ Mr. Marriott's position, that upon the estate vesting in *Lakshmi*, as sister of *Vithal*, her son *Ramji Krishnaji* and his son *Mohadeo Ramji* thereupon became jointly interested therein as co-partners

(1) 1 Bom. H. C. Rep. 209.

(2) 6 Bom. H. C. O. J. 1.

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with *Lakshmi*, must, in my opinion, be regarded as untenable : it seems opposed to the principles established in Hindu law regarding property coming by inheritance to women, and is inconsistent with the position already adverted to, as established by the case of *Vinayek Anandram v. Lakshmi Bai*, that the sister takes absolutely.' But the learned Judge proceeds to notice the decision of the Judicial Committee of the Privy Council and the text of *Katyayana*, and allows that in the case of inheritance by a widow from a husband, the rule laid down in the *Mitakshara* does not apply. So far he departs from what had been previously decided, and it will be seen that in this he differs from the judgment I am about to notice of Mr. Justice *West*, who gives as his opinion that the passage in the *Mitakshara* applies to the case of a widow inheriting from her husband just as much as to that of a daughter inheriting from her father. The case is *Vijia Rangam and another v. Lakshuman and another* (1)

" Now the decision in that case is founded upon the *Mayukha*. The Chief Justice says :—' The question of Hindu law arising from these facts is a difficult one, but looking (as I think, we are in this island bound to do), to the *Mayukha*, for the law to regulate this case, *Thama Bai* must be regarded as the legal representative of *Yesu Bai*, in respect of the property in question in this suit, and not the Plaintiffs :' and Mr. Justice *West*, says :—' We must fall back either on the *Mayukha*, which is equally inconsistent with a current of decisions derived from the analogies of the *Bengal* law, or else on the *Bengal* law itself.' But the learned Judge took the opportunity of this case coming before him to discuss at considerable length, and with much ability, the meaning of the passage in the *Mitakshara*, and to comment upon the authorities. He, too, does not appear to have noticed any of the decisions on this side of *India*, and what I have already said with regard to the decision in 1 *Bombay H. C. Rep.*, will apply to this part of his judgment. He lays down that the *Mitakshara* includes in *stridhan* all property acquired by woman by inheritance, which is contrary, as I have already said, to what had been laid down by Sir *Joseph Arnould* in the case in 6 *Bombay H. C. Rep.*, and contrary also to the decision of the Privy Council in *Bhugwandeen*

Doobey v. Myna Baie (1). He argues, as I understand him, that this case was not rightly decided. It appears to me that what Mr. Justice *Holloway* said, which I have read, applies very much to this judgment of Mr. Justice *West*. Certainly, when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decision of the High Court at *Madras* upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of *India* for the last fifty years on account of the opinion of a Judge of High Court at *Bombay*, however learned he may be. The consequences, at the present time, would be most serious. Courts ought always to bear in mind that it is no light matter to reverse a series of decisions which must have been acted upon for many years, and have been regarded as declaring what was the law.

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"It appears to me that the conclusion which Mr. Justice *Pontifex* arrived at in this case is the right one, and that his decision ought to be affirmed. The costs of the hearing on remand, in which the Appellant really was successful, ought to be regarded as part of the costs of the original hearing, and should be allowed in the same way as those costs were allowed, viz., out of the estate. The Appellant must pay the costs of this appeal on Scale No. 2."

Cowell, for the Appellant, said that the question whether the Appellant or Respondents were entitled depended upon whether *Lucky Bibee* took her father's estate absolutely or with reversion to her father's next heirs. The law which governed that issue was the personal law of *Thakoor dass*, who had been found to be a Jain, retaining the ceremonies of the Jains till his death, repudiating shradhs. Therefore the ordinary Hindu law, whether of the *Bengal* or *Benares* schools, could not apply; but the case could only be determined by the customs of the Jains, which ought for that purpose to be investigated: *Sheo Singh Rai v. Mussamut Dakho* (2). As no evidence thereof had been given by the Plaintiffs, he contended that the suit should be dismissed, or at least remanded for evidence. The Appellant had contended in his

(1) 11 Moore's Ind. App. Ca. 487.

(2) Law Rep. 5 Ind. Ap. 87.

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written statement that Hindu law governed the case, since he did not admit that *Takoordass* was a Jain. After the finding against him upon that point, his contention no longer applied. Although he had not objected to the finding that Mitakshara law applied, it was not too late to insist that the law really applicable should be applied: see *Lawson v. Carr* (1). It was the duty of the Court to direct that inquiry should be held as to the customs of the Jains: see *Sheo Singh Rai v. Mussamut Dakho* (2); *Boulnois and Rattigan's Customary Law*, p. 45. The question what law governs the succession to a man's estate cannot be affected by the pleadings or even admissions of the claimants thereto, and the High Court, probably on that principle, had remanded the case that it might be ascertained what law was applicable.

Assuming the Mitakshara to be applicable, it was contended that thereunder moveable property inherited by a daughter from her father becomes her stridhun. Reference was made to Mitakshara, c.2, s.4, pars. 1-7; and to Mr. Montriou's translation of the original text in Sanskrit, and of the Mitakshara commentary thereon, which were given in the record. The Mitakshara expressly directed that property inherited by a woman be included in stridhun, it contained no clauses restricting woman's estate or powers of alienation, it did not create any reversionary interest therein, nor did it point out who should be reversioners. It provided an order or orders of succession differing from the case of a male owner; and a husband married in the Brahma form is the next heir. Reference was made to *Mussumut Thakoor Deybee v Rai Baluk Ram* (3); *Bhugwandeep Doobey v. Myna Baie* (4); *Vijiarangam v. Lakshuman* (5). The first two cases applied solely to a widow under the *Benares* school; and even if, as stated in the *Bombay* case, it was impossible to draw any valid distinction between a widow and a daughter as respects the reasoning in those cases, yet they in terms controlled the express words of the Mitakshara by appeal to authorities extrinsic to it. The Jain in this case was found to be governed by the Mitakshara treatise, but not to have adopted any one school of Hindu law; therefore not to have adopted any of the auth-

(1) 10 Moore's P. C. 162.

(3) 11 Moore's Ind. App. Ca. 139.

(2) Law Rep. 5 Ind. App. p. 87. (4) Ibid. p. 487.

(5) 8 Bomb. H. C. R. O. C. J. 244.

rities which have been held to repeal as it were, the express provisions of the *Mitakshara*. The *Mitakshara* therefore should be construed not in reference to those authorities, but by its plain and literal meaning. The only external authority applicable was the rule already laid down in *Sheo Singh*'s case, that a Jain widow takes absolutely. In any case, no reason was shewn for resorting to a restrictive interpretation of the *Mitakshara* as regards a Jain, or as regards any Hindu not expressly held to be governed by the *Benares* school.

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Cowie, Q.C., and *Doyne*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by
SIR MONTAGUE E. SMITH :—

This suit was brought by the Respondents, the Plaintiffs below, to try the right to considerable moveable property which was taken into the hands of the Administrator-General on the death of *Lucky Bibee*, the wife of the Appellant, who was the Defendant below. The property in suit was the self-acquired property of *Thakoordass Baboo*, who died at *Calcutta* on the 13th of February, in the year 1860, without any male issue or widow, but leaving an only daughter, *Lucky Bibee*. This daughter was married in November, 1865, to the Defendant, and died on the 4th of September, 1872, without issue, her husband, the Defendant, surviving her.

The Plaintiffs are grandsons of a brother of *Thakoordass*, and it is admitted that they would have been the heirs of *Thakoordass* if he had left no issue. The question now is, whether they or the Defendant as the husband of *Lucky Bibee* became entitled to the property in question upon her death.

The first question which has been argued relates to the law which governed *Thakoordass* and his family at the time of his death. *Thakoordass* was a native of the *North-Western Provinces*, and came to reside in *Calcutta* in 1814, and lived there until his death. It is the common case of both parties that he retained the personal law of the place of his birth. He appears to have

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belonged to the sect of Jains ; and the first contention of the learned counsel for the Defendant is that the right of succession must be determined by the customs of the Jains,—that those customs have not been ascertained, and that the suit ought to be remanded for the purpose of ascertaining them.

The proceedings in the suit as to an inquiry into these customs certainly assume a somewhat singular shape, and the parties have apparently changed sides with regard to it in the course of the suit. The plaint in the first paragraph thus describes *Thakoor-dass* : "One *Thakoor-dass Baboo*, of the race or sect of Jains, and a resident in the North-West Provinces of *India*, in or about the year of Christ 1814 came to *Calcutta*, and there remained until his death, retaining and following the usages of his said sect." The written statement of the Defendant in the 9th paragraph contains this passage : "The said *Thakoor-dass Baboo*, deceased, was, and the Plaintiffs and the Defendant are, governed by the Mitakshara law of inheritance which obtains at *Behar* in the North-Western Provinces of *India*." That is a distinct and simple assertion that the family was governed by the law of the Mitakshara. There is no allegation that that law was modified by any custom of the Jains. This being the original allegation of the Defendant, now that the right has been decided according to the law of the Mitakshara which he had invoked, he turns round and alleges that this is wrong, and that the succession ought to be determined by the usage and custom of the Jains. Mr. *Cowell*, who very ably argued the case, has done all that possibly could be done to find a foundation for this contention, but the case does not really afford, when it comes to be examined, sufficient materials for the purpose.

The point arises in this way : Issues were settled, the first and second of which were—"First, was *Thakoor-dass* a Jain ? if so, what is the law of succession applicable to Jains ?" At the hearing of the cause before Mr. Justice *Pontifex*, the advocates of both parties proceeded to consider the effect of the Mitakshara law as bearing upon the trial of these issues, and the contention was stated by the Judge in his judgment thus :—Having stated the issues : he says, "But Mr. *Kennedy*, on behalf of the Plaintiffs, insists that under Mitakshara law, apart from any peculiar law of inheritance

affecting the succession to property among Jains, the deceased *Luckhy Bibee* took only a qualified interest in the property in dispute, which interest was not transmissible to her heirs ; but upon her death the property reverted to the next heirs of her father ; and it was not disputed, on behalf of the Defendants, that the Plaintiffs would be entitled to the property in question in this suit if it was established that under the Mitakhshara law a daughter does only take a qualified estate in her father's descended property simliar to the qualified estate of a widow." It is important to observe what was then not disputed by the Defendant's advocate. The judgment proceeds as follows : "Mr. *Evans*, on behalf of the Defendants, nevertheless insisting that under the Mitakshara law the daughter takes an absolute interest in property descending to her from her father, which interest on her death descends to her own heirs and not to the heirs of father. Under these circumstances of the case I consider it right that the question of inheritance and Mitakshara law should be argued before trying the issues above referred to.' In consequence of the line thus taken by the advocates of the parties, Mr. Justice *Pontifex*, having heard their arguments on this question, decided that by the law of the Mitakshara the daughter took a restricted estate only. The Defendant appealed to the High Court from that judgment. Their Lordships have looked through the memorandum of appeal, and they find no objection or complaint on the ground that Mr. Justice *Pontifex* had not tried the issues as to the customs of the Jains. When the case came before the High Court it directed the case to be remanded for the trial of these issues. The reasons for this judgment do not appear upon the record. The Court probably acted on its own motion, desiring to be informed upon those issues ; for the remand was certainly not warranted by any objection appearing in the grounds of appeal.

On the trial of these issues two witnesses only were called. Neither side appears to have gone into evidence as to the customs of the Jains, or to shew that the rule of inheritance amongst the sect of Jains, to which *Thakoordass* and his family belonged, was different from the ordinary law. Mr. Justice *Pontifex*, who heard the evidence, found upon it that, although the father was a Jain, the case was governed by the law of the Mitakshara, and the

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judgment of the High Court, now appealed from, has proceeded upon that finding.

The Plaintiffs objected to the finding on the above issues. Their objection was that the learned Judge in the Court below was wrong in holding that the case was governed by the *Mitakshara* law, and that he ought to have held that the case was governed by the Hindu law of the *Bengal* school; and secondly, that if it were not so governed, it was governed by the Hindu law of the *Benares* school. Those objections were taken by the Plaintiffs in the belief that the law of the schools they referred to would be more favourable to them than the law of the *Mitakshara*; but what is material on the present point, and why attention is now called to these objections, is, that the Defendant did not object to the finding of the Judge upon the ground that the Judge ought to have gone into the evidence as to the laws and customs of the Jains. By the *Code of Procedure*, sect. 354, if the Defendant meant to insist that the laws and customs of the Jains had not been ascertained, he ought to have objected at that time. The section is clear: "Either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, and after the expiration of the period so fixed the Appellate Court shall proceed to determine the appeal." The Defendant, having that opportunity of objecting, did not think fit to do so, and accordingly the High Court proceeded to consider the case upon the law of the *Mitakshara*.

Mr. *Cowell* ultimately argued the case as if it was to be presumed that all Jains were governed by customs with regard to inheritance differing from the ordinary law, and he suggested that a case, which was recently before this tribunal, supported that view. The case he referred to is *Sheo Singh Rai v. Mussumut Dakho and another* (1); but their Lordships think that that case does not support it. On the contrary, the effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail. If Mr. *Cowell's* argument is right it would be only necessary that a man should be found to be

a Jain to establish the conclusion that the ordinary law did not apply to him. The contrary is certainly to be inferred from the decision of this Board.

As this argument was rather strongly pressed by Mr. *Cowell* it will be well to refer to some passages in the judgment in that case. In page 107, in commenting upon the judgment of the High Court, it is said : " The Judges then proceed to an elaborate review of the decisions in *India* in which the laws and customs of the Jains have been considered. It appears to have been contended before them—to use the words of the Court—that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case ; and further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the Appellant who argued the case at their Lordships' bar felt himself unable to dispute the correctness of this conclusion." Their Lordships proceed to say : " It would certainly have been remarkable if it had appeared that in *India*, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains the privilege of being governed by their own peculiar laws and customs, when those laws and customs were by sufficient evidence capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise." The result of the decision is stated in the following

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passage : "In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit." This decision did no more than adopt and affirm the law, to be deduced from a long roll of cases in *India*, that when the customs of the Jains are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them.

The result of a review of the proceedings in the present case is, that the Defendant cannot now impeach the judgment appealed from on the ground that the customs of the sect of Jains, to which this family belong, have not been ascertained.

The remaining question is, whether the High Court has taken a correct view of the law, which is now assumed to be that of the Mitakshara, in holding that *Lucky Bibee's* right was a qualified right only, and not an estate of the nature of stridhun.

The law of inheritance in the case of woman has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in the 11 *Moore's Indian Appeals*. The first is *Mussumat Thakoor Deyhee v. Rai Baluk Ram and others* (1), and the other is *Bhugwandeen Doobey v. Myna Baie* (2). After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that under the law of the Mitakshara a widow's estate inherited from her husband is a limited and restricted estate only.

After these decisions the question is reduced to the point whether a daughter inheriting from her father stands in a higher and different position from that of a widow ? Reliance has been placed on the often cited text in the Mitakshara relating to woman's property. The words most relied upon are contained, not in the text, but in an interpretation of the text. The 11th section of the 2nd chapter, paragraph 1, defines what is woman's property. The important part of the paragraph is : "The author now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it. ' What was given to a woman by the father, the mother, the husband, or a brother or received by her at the nuptial fire, or presented to her on her

husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property.' " It seems that the word in the original text "any other" is "*adya*," and that the proper translation of the word would be "or the like," so that the passage ought to be read "or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, or the like." The interpretation gives a more specific definition, and instead of "or the like," there are given the words which have been so often cited, and have given occasion to so much discussion. "Also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by *Menu*, and the rest, woman's property." The original text does not afford any foundation for the argument in favour of the right of the widow and daughter to the entire interest in land acquired by inheritance; the interpretation, no doubt, does. No decision of this tribunal has been referred to with regard to the estate taken by the daughter inheriting from her father, but the arguments which were pressed at the Lordships' bar in the present case by Mr. *Cowell* were presented and fully developed in the former cases before this tribunal relating to widows. The reasons by which these arguments were answered in the judgment of the Court—reasons which it is not necessary to repeat—are, for the most part applicable to the case of a daughter.

But their Lordships cannot regard the question of the daughter's estate as "*res integra*." It has been the subject of numerous decisions in India. The Indian authorities are carefully collated in the judgment of Mr. Justice *Pontifex* and of the Judges of the High Court. The result appears to be that the Courts in *Bengal* and *Madras* have determined in a series of decisions that the daughter takes a qualified estate only. No doubt in the Courts of *Bombay* there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir *William Macnaughten* in his Treatise on Hindu Law, p. 22, in these terms: "But though the schools differ on these points,

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they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue male. According to the law, as received in *Banares* and elsewhere, it does not go as stridhan to her husband or other heir, and according to the law of *Bengal* also it reverts to her father's heirs."

With regard to the case most relied upon in the High Court of *Bombay*, it would seem to have been there admitted, that after the decisions which have taken place, the daughter's estate, according to the *Banares* school, was only a restricted one. The family of *Thakoordass* is apparently governed by the law of that school. Certainly it is not governed by the law of the *Mayukha*, which was held to be the governing law in the *Bombay* case.

Their Lordships may observe that the authorities are collected and discussed in Mr. *Mayne's* learned Treatise on Hindu Law.

Their Lordships think that after the series of decisions which have occurred in *Bengal* and *Madras*, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the *Mitakshara*; on the contrary, it appears to them to be in accordance with them. The result is that they will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss this appeal with costs.

Solicitors for the Appellant : *Barrow & Rogers.*

Solicitors for the Respondents : *T. L. Wilson.*

RAMESHUR PERSHAD NARAIN SINGH. PLAINTIFF ;

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KOONJ BEHARI PATTUK AND ANOTHER . DEFENDANTS.

Nov. 8, 9 ;
Dec. 3.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Artificial Watercourse—Right to the Flow of Water—Presumption.

The right to the water of a river flowing in a natural channel through a man's land and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

Wood v. Waud (1) approved.

Held, in this case that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the Defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means.

APPEAL from a decree of the High Court (Aug. 18, 1874) reversing a decree of the Subordinate Judge of *Gya* (July 31, 1873), and dismissing the suit of the above-named Appellant.

The facts of the case are stated in the judgment of their Lordships.

The object of the suit was to have established an alleged ancient right as against the Respondents, his neighbouring proprietors, to have certain of the Plaintiff's villages, five in number, irrigated out of a "tal" or artificial reservoir of water existing on the Respondents' land of *Mahooet*, and to have certain dams erected

*Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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and channels for water cut by the Respondents removed and filled up, and to have a channel by which the Plaintiff alleged he had been in the habit of receiving water for irrigation re-opened, and the Respondents perpetually restrained from wasting the waters of their "tal," or from ever discharging its waters, except towards the Plaintiff's villages and through that particular channel.

The Respondents, in substance, resisted the Plaintiff's claim on the ground that the "tal" in question was kept up by them on their own land for their own irrigation, and was supplied by the "collected rain water" which ran into it, and that they were entitled to use that water for their own benefit, and that the Plaintiff had no right such as he claimed.

The Subordinate Judge deputed an Ameen to visit the ground and make a map and local investigation. The general effect of his report was that the Plaintiff's irrigation had suffered from the grandees or dams which the Defendants had raised, and from the passages which they had cut to let the water flow out of their "tal" towards their own lands.

The Subordinate Judge directed that the Plaintiff's claims be granted, and ordered that a decree be given to the Plaintiff, and the right to irrigate the lands of mouzah *Chahul*, &c., with the water of the *Mahooet Tal*; that the outlet which, contrary to long-established usage, has been recently dug on the west of the tal for carrying the water to the *Nuddi Ponwar*, be filled up, and the new "Kurrah" issuing out of the eastern kunwa lying between the spots marked [native character] and [native character] in the Ameen's map be shut up; that the grandees Nos. 1 and 2 be thrown down, and the Plaintiff be authorized to keep clear the passage for water from the *Mahooet Tal* to the reservoir of the bund of mouzah *Chahul*, and that the Defendants be for ever prevented to let out the water of the tal of *Mahooet* towards the villages of any proprietors excepting those of the Plaintiff, and that the cost, besides interest at 8 annas per centum per mensem, from the date of the decision to the day of payment, be charged to the Defendants.

The High Court (*Phear and Morris, JJ.*) reversed this decision, and were of opinion "that the Plaintiff had failed to make any such right as would entitle him to restrain the Defendant from

the use of the water which passes along the channel from the tal *Mahooet* to the tal *Chahul*, and that therefore the Plaintiff's suit ought to be dismissed." They "accordingly reversed the decision of the Lower Court, and dismissed the Plaintiff's suit with costs in both Courts."

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C. W. Arathoon, for the Appellant, contended that according to the razinamah of the 6th of April, 1831, whenever there was any necessity for discharging the water of *Tal Mahooet*, it ought to be discharged towards *Tal Chahul*, and in no other direction, and anyhow the Respondents were bound thereby not to open the said tal towards the river *Ponwar*. The evidence and the Ameen's report established the ancient prescriptive right of the Appellant to irrigate his mouzahs out of water from *Tal Mahooet*; and the acts recently done by the Respondents in placing dyber (grandees) in the eastern khonwa to divert the water into the *Bahaween* river, and in cutting an outlet on the west of *Tal Mahooet*, were done with a view to hinder the Appellant from the just and rightful use of the water by him, and not, as supposed by the High Court, to irrigate their own lands. The Respondents had not an unqualified right to the water in the *Tal Mahooet*, and it was a mistake to say that the Plaintiff sought to restrain them altogether from the use of it.

Doyne, for the Respondents, contended that the Appellant had failed to shew any ground on which he should be held to have acquired a right to interfere with the Respondents' use and enjoyment of their own water. The reservoir in question was an artificial one, the Respondents were not claiming exclusive right in a natural stream, the whole irrigation was merely artificial, and therefore the Appellant had no right to prevent their diverting at their own discretion the waters of their own reservoir for the irrigation of their own lands. [SIR MONTAGUE E. SMITH:—Do you contend that there can be no right acquired by user in an artificial channel?] See *Arkwright v. Gell* (1), which is an authority in the negative. [*Arathoon* referred to *Holker v. Poritt* (2). SIR MONTAGUE E. SMITH:—If an artificial water-course is allowed for some time to empty itself on another's land,

(1) 5 M. & W. 203.

(2) Law Rep. 8 Ex. 107.

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his consent thereto is implied, and it may have been for a corresponding advantage to him.] See *Gale* on Easements [2nd Ed.] p. 181 h. [SIR ROBERT P. COLLIER referred to *Magor v. Chadwick* (1).] It is contended that the overflow upon a neighbour's premises gives that neighbour no right to a continuance of the overflow, even though it has lasted for a century. Reference was then made to *Wood v. Waud* (2), and *Mason v. Shrewsbury and Hereford Railway Company* (3). The intention of the Respondents was not to hinder the Appellant's use of the water, but to irrigate their own fields, in consequence of which the water was drained away to the *Bahaween* river. [SIR MONTAGUE E. SMITH :—But it may have been that originally there was a natural overflow of the river on the Appellant's land, and that you were allowed to interfere with it on terms of the Appellant having the water after you.] The particular channel which leads to the reservoir is an artificial one. It is merely a case of storing water for the dry season, and the water comes down to the reservoir in the rainy season by this channel. [SIR MONTAGUE E. SMITH :—There seems to have been something like a general system of irrigation, by a succession of tanks, giving rise to the presumption of a general agreement. It is a strong thing to say that a person whose land has been irrigated for so many years has no right.] It is not shewn that the Appellant contributes in any way to the maintenance of tank *Mahooet*, or could complain if the Respondents allowed it to go to ruin. There is no presumption of any grant to him, or of any right being vested in him. If any right, what right? A right to an overflow after Respondents have had the full use of all the water to any extent they please. [SIR MONTAGUE E. SMITH :—No; the right to overflow after you have used the water for certain purposes—i.e., for irrigation.] It is most difficult to say what is overflow or excess water, what is the proper farming discretion, as it were as to its user, whether a person who has an unlimited right to use water for irrigation purposes uses too much.

Arathoon replied.

(1) 11 Ad. & E. 585

(2) 3 Ex. 748; 18 L. J. (Ex.) 305.
(3) Law Rep. 6 Q. B. 578.

Dec. 3. The judgment of their Lordships was delivered by
SIR MONTAGUE E. SMITH :—

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In this suit the Appellant (Plaintiff below), the owner of mouzah *Chahul* and four other mouzahs, complained of the diversion of water, which, as he alleged, ought to flow from an adjoining estate belonging to the Defendant, called mouzah *Mahooet*, to his own.

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Mahooet lies to the south of the Plaintiff's mouzahs, and the land falls in a northerly direction from *Mahooet* towards them.

A large reservoir, called *Mahooet Tal*, formed by artificial embankments, has existed for a long time in the Defendant's mouzah. It appears to be fed partly by water which is brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land, and was undoubtedly created for irrigating purposes. A large khonwa (overflow channel) has been cut on the eastern side of this tal running in a northerly direction, by which, and by other channels, water from this tal has flowed to another and lower tal constructed at the northern extremity of mouzah *Mahooet*, and mainly upon it, called *Chahul Tal*, from which last tal the water is carried by several channels to mouzah *Chahul* and the other mouzahs of the Plaintiff, for the purpose of irrigating them.

According to the evidence in the case, this system of irrigation has existed beyond living memory.

The complaint of the Plaintiff is that the Defendant has placed two grandees or dams in the khonwa above described, and has also cut a new channel from the northern part of the khonwa, the effect of which is to prevent the water in the khonwa from flowing to the *Chahul Tal*, and to divert it altogether from his mouzahs. He also complains that the Defendant has prevented the water issuing from the tal on its western side from flowing to his land as it had formerly done, and has carried it into or in the direction of the River *Ponwar*.

The Plaintiff does not dispute the right of the Defendant to use the water of the *Mahooet Tal* for irrigating that mouzah, but, subject to that use, claims, as a right, that overflow water of the tal and the surplus water, after irrigating the Defendant's

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mouzah, shall be allowed to flow in the accustomed manner to his mouzahs.

The defence, as their Lordships understand it, is two fold. In the first place, the Defendant denies the Plaintiff's right to any of the water flowing from the tal ; and, secondly, he contends that if any right exists, it is to the overflow of the tal only, and that he has not infringed this limited right.

The subordinate Judge passed a decree in favour of the Plaintiff, declaring him to have the right to irrigate the lands of his mouzahs with the water of the *Mahooet Tal*, and giving relief against what he found to be wrongful diversions of the water in the manner which will be hereafter commented upon.

Upon appeal to the High Court this decree was reversed. The Judges of that Court seem to have considered that the Plaintiff had put his claim in such a way that, if affirmed, it would deprive the Defendant of the use of the water of *Mahooet Tal* for irrigating his own mouzah. Their Lordships, however, do not understand the claim to be so extensive as it was thus assumed to be. It does not very distinctly appear whether the Judges of the High Court meant to decide that the Plaintiff had not such a right as they considered him to have claimed, or that he had established no right whatever to the flow of any of the water issuing from *Mahooet Tal*. They rested their judgment, however, in a great decree on the fact that the tal and khonwa are artificial works erected on the Defendant's own mouzah.

There is no doubt that the right to the water of a river flowing in a natural channal through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's Bench, in the

case of *Magor v. Chadwick* (1), that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, which appears to their Lordships to be correctly decided—*Wood v. Waud* (2)—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

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It was said by the Court in *Wood v. Waud* (3) :—

"We entirely concur with Lord *Denman*, C. J. that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible ;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision, *Greatrex v. Hayward* (4), Baron *Parke* shortly states the principle thus :—

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

(1) 11 A. & E. 586.

(2) 3 Ex. 748; 18 L. J. (Ex.) 305.

(3) 3 Ex. at p. 777.

(4) 8. Ex. 293.

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In the case then in question the Court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In a subsequent case the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned Judge who tried the cause, to the effect that if the stream were an artificial one no right whatever could have been acquired in it. The Court held the direction was incorrect, "because" (in the words of the Court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream" : *Sutcliffe v. Booth* (1).

What then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed ? In the first place, as a question of fact, the *Mahooet Tal* appears to be of a permanent nature. Next, the construction of the *Chahul Tal*, which receives the surplus water of the upper tal, by means of the khonwa and other channels, indicates that a permanent and connected system of irrigation for what are now the Plaintiff's and Defendant's mouzahs, beneficial to both estates, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the *Chahul Tal*, was built mainly on the Defendant's mouzah, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouzah ; and it is evident, from its situation, that its main, if not only, use was to store water for the convenient irrigation of the Plaintiff's mouzahs. Then it is proved that the water has been used and enjoyed for irrigating these mouzahs from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

It may be that at the time when this system of irrigation was adopted the mouzahs now belonging to the Plaintiff and the Defendant formed one estate, and if so, on severance, the right to the continued flow of the water in the accustomed channels would

arise and subsist (see on this point *Watts v. Kelson* (1)); or, if the mouzahs were always separate, it may be that, by the construction of the *Mahooet Tal*, water was intercepted which would naturally have flowed to *Chahul*, and that this or some other consideration existed, which led to an agreement between the proprietors respecting the use of the water.

Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

In 1831 proceedings were taken in the Criminal Court of zillah *Berar* by the owners of *Chahul* against some ryots of *Mahooet* in consequence of their having closed the khonwa from *Mahooet Tal* to *Chahul Tal*, which led to a razinamah being come to, dated the 6th of April, 1831, between the Elakadars of the two mouzahs. In that agreement the khonwa is described as being then an ancient one. It recites that disputes arose respecting "the closing of a long standing khonwa of water of the tal of mouzah *Mahooet*." The arrangement come to is thus expressed:—

"Now between our client aforesaid and the said Rajah *Saheb* a compromise has been made in this manner: that when the water of the 'tal' of mouzah *Mahooet* aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said 'negar' towards the 'tal' of mouzah *Chahul*, &c., through the course of the long standing 'negar,' which the Elakadar of *Chahul*, &c., declares to be a 'kunwa'; that they shall not open it towards the River *Ponwar* or in any other direction. And that the power of closing and opening the 'negar' of the 'tal' of mouzah *Mahooet* aforesaid, rests with the Elakadar of the said *Mahooet*.

"As *Moulvi Kasim Ali*, 'Elakadar' of mouzah *Mahooet*, has acknowledged the 'kunwa' of 'tal' *Mahooet* towards the mouzah *Chahul*, &c., therefore a mutual adjustment has been effected, and the contents of the razinamah are true."

The effect of this arrangement seems to be that the overflow of the tal shall be always discharged through the khonwa, and in no other direction. This agreement appears to refer only to the

(1) Law Rep. 6 Ch. 166.

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overflow water discharged from the tal through the khonwa (which was then apparently the only matter in dispute); but it is a clear acknowledgment of a right to this overflow. This is made plain by the statement that "the Elekadar of mouzah *Mahooet* has acknowledged the khonwa of *Tal Mahooet* towards the mouzah *Chahul*."

It was objected that this razinamah does not bind the proprietor of *Mahooet*; but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water.

The parties were again before the Criminal Court in 1864; the Elakadar of *Mahooet* being on this occasion the complainant. What then occurred appears in the following record of the proceedings:—

"Case in respect of the dispute for the use of the water of *Tal Mahooet*.

"It is evident that the property in dispute lies in mouzah *Mahooet*, and is known by the name of tal.

"It appears that both parties claim the right to use the water collected in this tal. The point at issue is this: Whether one party alone has the right to the water, or both the parties are entitled to the use of it? It seems that a protracted period has elapsed, that a dispute had occurred regarding this very tal between the parties concerned in the present case. From the razinamah (deed of compromise) filed by the second party, against the genuineness of which the first party has no reason to object, the above dispute appears to have been decided as follows: That the people of mouzah *Mahooet* had entered into an arrangement with the opposite party to allow the water of the tal aforesaid to flow towards the *Tal Chahul*, and not to allow the same to flow in any other direction. This proves that although the tal is situated within the land of the first party, and although by virtue of the razinamah, the first party is vested with the power of discharging or withholding the water, yet the opposite party is entitled to the use of the said water when it is once discharged. Therefore it is

"Ordered, that according to sect. 320 of the *Criminal Procedure Code*, the first party shall not exclusively hold possession of the

water, the subject of litigation, till the said first party obtain a decision from a competent Court declaring that he is entitled to hold possession without the participation of any other person."

The *Mahooet* proprietors do not seem to have challenged this decision of the magistrate in the Civil Court.

The map produced by the Elakadars of mouzah *Mahooet* in the course of the proceedings just referred to, affords strong evidence in support of the claim of the Plaintiff, that the overflow of the tal, and also the surplus water remaining after the irrigation of the Defendant's mouzah, ought to flow to the *Chahul Tal*, without being diverted by the Defendant, except for irrigating mouzah *Mahooet*, and it seems to their Lordships that the Subordinate Judge was correct in attaching great importance to this map. The witnesses for the Plaintiff, to whom this Judge gave credit, also prove a continuous use and enjoyment of the water.

It is not inconsistent with the Plaintiff's claim that the power of fixing the time for letting off the overflow from the *Mahooet Tal* should reside with the Defendant. The necessity for this operation would obviously occur in the rainy seasons, and it is apparent upon the evidence that in these seasons a considerable quantity of water is let off, which runs down to the *Chahul* reservoir, and is stored there.

Their Lordships therefore are of opinion that the Plaintiff has established a right to have the overflow water of the *Mahooet Tal* discharged into the khonwa, so that it may flow through it towards the *Chahul Tal*; and also a right to the flow of the surplus water towards the tal as heretofore. But they think that his whole right is subject to the right of the Defendant to irrigate the lands of mouzah *Mahooet*, and to take by proper channels and other proper means so much of the water as may be proper and requisite for such purpose.

Their Lordships will now consider the evidence of the Defendant's interference with these limited rights.

As to the diversion by means of the two grandees, and the new channel on the eastern side of *Mahooet*, the Ameen has found, and the evidence (to which credit is given by the Subordinate Judge) supports his finding, that the two grandees, No. 1 and No. 2, obstruct the flow of water from the khonwa into the channels

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which lead to the reservoir of *Chahul*, and thus divert the water which would otherwise have flowed to it, and cause it to run into the new channel cut by the Defendant in a north-easterly direction, by which it is ultimately discharged into the river *Bahaween*.

The Defendant does not deny this diversion, but asserts that it was done to irrigate his own lands.

It is, however, found that by the Ameen that neither of the grantees nor the new channel is required for this purpose, and in this also his report is corroborated by the evidence. The Subordinate Judge of *Gya*, by whom the Ameen was examined, has adopted his findings, and has also come to the conclusion that these obstructions were made to injure the Plaintiff.

The judgment of the High Court does not disturb the above conclusions of fact, and indeed passes them by, the learned Judges being of opinion, as already stated, that the Plaintiff had failed to establish the right he claimed.

The Subordinate Judge has ordered that these obstructions should be abated, and their Lordships agree in this respect with his judgment.

As to the alleged diversion to the west, the Subordinate Judge seems to have considered that the Defendant had made a breach in the western bank of the tal, and cut a new passage to carry the water along the western side of his fields to the River *Ponwar*, and he has ordered this assumed new passage to be closed. This part of the decree seems to have been made under a misapprehension of fact. The Ameen, as their Lordships understand his report, finds that no breach had been made in the western bank of the tal, but he does report that two nala^s had been formed, which carried the water to the River *Ponwar*. It is not very clear, upon the Ameen's report, whether these nala^s were cut by the Defendant or were naturally formed. He does, indeed, also find that there is a passage for the water to go "to the west of the River *Ponwar*." This cut or passage, it is to be observed, is not mentioned in the plaint. Even if it had been complained of, their Lordships think that the evidence of any diversion of water by these means to the west is too obscure to warrant a decree directed against any specific act, and, therefore, the decree of the Subordinate Judge, so far as it directs the closing of the assumed

new passage, ought not to stand. If, however, any acts have been done on the western side of *Mahooet* contrary to the declaration of right which their Lordships will advise Her Majesty to make, the injunction, which they will also advise, will embrace such acts, and enable the Plaintiff to compel their discontinuance.

On the whole case, their Lordships have come to the conclusion that the decree of the High Court cannot be maintained. They are also unable to affirm in its entirety the decree of the Sub-ordinate Judge. In that decree the right is declared in terms which are, in their opinion, too wide and general, and they have already observed that the specific order to close the assumed new western channel is supported neither by allegation nor by sufficient proof.

They also think that it was not correct to insert in the decree a declaration of the Plaintiff's right to scour the khonwa. *Prima facie*, and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of the water, but no issue was raised on this point, nor does it appear that any effort of the Plaintiff to cleanse the watercourse has been obstructed by the Defendant.

Their Lordships will therefore humbly advise Her Majesty to reverse both the decrees below, and in lieu thereof to direct that a decree be passed in favour of the Plaintiff, declaring that the Plaintiff has a right in the overflow of water discharged from the *Mahooet Tal*, whenever the same is discharged by the Defendant, and that such overflow ought to be discharged into the khonwa on the eastern side of the said tal, and to flow through the same towards the *Chahul Tal* in the accustomed manner for the purpose of irrigating mouzah *Chahul* and the other four mouzahs of the Plaintiff mentioned in the plaint ; and also declaring that after the Defendant's right to the use of the water of the said tal for the purpose of irrigating the lands of mouzah *Mahooet* by proper and requisite channels and other proper means has been satisfied, and subject thereto, the water which may remain after such use by the Defendant, ought to flow, in the accustomed channels and manner, towards the *Chahul Tal* for irrigating the said mouzahs of the Plaintiff, without being diverted therefrom, otherwise than by such diversion as may be occasioned by the irrigation of the

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lands of mouzah *Mahooet* in a due and proper manner as aforesaid ; and also that by the said decree it be ordered that the grandees marked No. 1 and No. 2 in the Ameen's map be removed, and that the new kurrah from the said khonwa shewn in the same map, from the spot marked by the letter *alif* to the spot marked by the letter *ba* be closed ; and that it be further ordered that the Defendant be enjoined not to discharge or divert the overflow of the *Mahooet Tal*, or the water remaining after irrigating mouzah *Mahooet*, as aforesaid, in any direction or manner contrary to the above declaration of right.

Their Lordships consider that the Plaintiff is entitled to receive from the Defendant his costs incurred in the Court of the Sub-ordinate Judge of *Gya*, but as an appeal to amend and limit the decree of that Court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The Appellant will have the costs of the appeal to Her Majesty.

Solicitor for the appellant : *T. L. Wilson.*

Solicitors for the respondents : *Watkins & Lattey.*

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AND		
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AND		
LALLA BISHESHUR DYAL AND OTHERS	PLAINTIFFS.	

(CONSOLIDATED APPEALS.)

ON APPEAL FROM HIGH COURT AT BENGAL.

Execution—Sale of Right, Title, and Interest—Act VIII. of 1859—Act VIII of 1869 (Bengal Council), ss. 59, 60, 66.

In execution proceedings under Act VIII. of 1859, whether the property attached is an under-tenure or an ordinary leasehold interest, only the right, title, and interest of a judgment debtor can be sold ; while by virtue of a sale of a tenure under sect. 59 of Act VIII. of 1869, the purchaser acquires it, under sects. 59, 60, and 66, free of all incumbrances which may have accrued thereon by any act of any holder of the said under tenure, his representatives or assignees unless the right of making such incumbrances shall have been expressly vested in the holder.

APPEALS from two judgments of the High Court (June 4, 5, 1874), reversing on special appeal the judgments of the Judge of *Shahabad* (June 26, 27, 1873), by which appeals from the judgments of the Subordinate Judge of *Shahabad* (April 21 and Feb. 4, 1873), had been directed to be dismissed.

The facts of the cases are sufficiently stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellants.

Doyne for the Respondents.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

In these two cases the property in respect of which the actions were brought was the mouzah called mouzah “ *Inglis* ” in the dis-

* Present : SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MANTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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trict of *Shahabad*. That mouzah many years ago was granted to *Gooran Khan*, an invalided havildar, under the provisions of the 33rd section of Regulation XLIII. of 1793. By virtue of that section *Gooran Khan* held the property free of revenue and free of rent during his life as a jageer, but upon his death the property became liable to be assessed, and by virtue of the section, to which allusion has been made, the assessment would be in the nature of rent payable to the zemindar of the estate in which the mouzah was situate. The zemindar in question was the Maharajah of *Domraon*. Upon the death of *Gooran Khan*, *Bachoo Khan*, his son and heir, came in as his representative, and the property then being liable to assessment, he entered into a settlement with the Maharajah in September, 1827, upon which a rent was reserved to the Maharajah in respect of the tenure. *Bachoo Khan* died in October, 1860, a period within twelve years before the commencement of the suit. He left a widow, *Nazirun*, and a son, *Gooder Khan*, and three daughters, *Nazeerun*, *Saheebun*, and *Peerzadi*. The son was entitled to a share of 5a. 7p. 4k., and the three daughters were entitled to shares amounting together to 8a. 4p 16k. of the mouzah. The widow appears to have given up her share altogether, and it may be assumed for the purpose of this decision that the son took the widow's share, which together with his own share of 5a. 7p. 4k, gave him an interest to the extent of 7a. 7p. 4k. That interest added to that of the daughters, makes up the whole amount of the 16 annas of the mouzah.

After the death of *Bachoo Khan*, his son *Gooder Khan*, was sued in respect of a loan which had been made to *Bachoo Khan*. Proceedings went on, and a decree was ultimately obtained under arbitration against *Gooder Khan*. *Gooder Khan*, in order to raise money to satisfy that decree, borrowed a sum of money from *Ram Jeawan Singh*. *Gooder Khan* was sued by *Ram Jeawan Singh* in respect of the money so borrowed; and although *Gooder Khan* had mortgaged a 12 annas share of the mouzah to *Ram Jeawan* as a security for the loan, the action against *Gooder Khan* was treated merely as one for an ordinary debt, and *Ram Jeawan* obtained a decree against him for the money due, and interest. Upon that an execution was issued. *Biseshur* purchased under that decree not the 12 annas share, which had been mortgaged,

but merely the right and interest of *Gooper Khan*, which, as already stated, amounted to 7a. 7p. 4k. The Maharajah also brought a suit against *Gooper Khan* for three years' rent, which was due under the settlement made with him. That suit was brought under the provisions of Act VIII. of 1869 of the Government of *Bengal*. In that suit it was ordered that an *ex parte* decree be passed in favour of the Plaintiff, that the Plaintiff do recover the amount claimed, with costs, and interest at the rate of 6 per cent. per annum up to the day of realization from the Defendant. The Maharajah proceeded to execute that decree against *Gooper Khan*. On the 31st of March, 1872, he applied to have it executed. He gave the names of the parties, and then he stated what redress he sought from the Court. He stated under that head, "The attachment and sale of the property belonging to the judgment debtor,"—that is, the property belonging to *Gooper Khan*. The petition ran in this way: "The decretal money due to your petitioner is payable by the judgment debtor under a decree mentioned above. Your petitioner, therefore, begs to file this petition along with an inventory of the property belonging to the judgment debtor, and prays that by attachment and sale of the judgment debtor's property the decretal amount, together with costs and future interest up to the day of realization, be ordered to be recovered from the judgment debtor." An inventory was attached to that petition in the following words: "Inventory of the invalid lands, being the kasht (cultivation) of the judgment debtor, situated in mouzah *Rampore*, pergunnah *Bhojepore*, for the recovery of the arrears of rent whereof the present decree is passed, amounting to 120 beegahs." It therefore appears clear that that application was merely that by attachment and sale of the judgment debtor's property the decretal amount might be realized. By virtue of the 59th section of the said Act VIII. of 1869, the Maharajah, if he had pleased, was authorized to apply for the sale of the tenure. By that section it is enacted that, "Whenever a decree shall be passed for an arrear of rent due in respect of an under tenure, which by the title deeds or the custom of the country is transferable by sale, and the judgment creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have

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been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the district within which the land comprised is such under-tenure is situate, and to be fixed on some conspicuous place on such land, and on some conspicuous place in the town or village in or nearest to which such land is situated, a notice for the sale of such under-tenure on some fixed date, not less than twenty days from the hanging up of such notice in such Court." By sect. 34 of the same Act it is enacted that, "Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the *Code of Civil Procedure* passed by the Governor General in Council, being Act No. VIII. of 1859, and by such further and other enactments of the Governor-General in Council in relation to civil procedure as now are or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." It appears therefore that although the Maharajah might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against the property of the Defendant. It has already been shewn what the application of the Maharajah was. He asked that the decree might be realized by the sale of the property of the judgment debtor. Upon that application the Moonsiff issued a perwannah described as a "perwannah for execution of decree under sect. 233 to sect. 238, Act VIII. of 1859." If he had considered that the application was an application to sell the tenure under sect. 59 of Act VIII. of 1869, it would have been described as a procedure under that section, and not under the sections of the *Civil Procedure Code* to which the Moonsiff refers in his perwannah. The perwannah issued to the officer was as follows: "Pursuant to an order of this day, you are required to attach the under-mentioned properties, under the provisions of Act VIII. of 1859, as they may be pointed out by the decree-holder, and submit the inventory of the property attached, with your report, within a week." Then he describes the property "invalid land held in cultivation," and he gives the boundaries of the land. So that the perwannah was merely to attach that property under the provisions of Act VIII.

of 1859. Now it is clear that in attaching the property of a judgment debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act VIII. of 1859, you can only attach and sell the right, title, and interest of the judgment debtor; but if you proceed to sell a tenure under sect. 59 of Act VIII. of 1869, then you sell the tenure; and by virtue of sect. 66 of the same Act, the purchaser, under the provisions of sects. 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of sect. 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of Government revenue. Having issued that perwannah to the officer to execute the decree, notice of the intended sale was given. It is headed "sale notification," not under sect. 59 of Act VIII. of 1869, but "a sale notification under S. 246 of Act VIII. of 1859;" and it proceeds: "Auction sale of the rights and interests in the under-mentioned properties for the realization of the amount covered by the decree." And then it states: "Notice is hereby given to the public that *Sahib Ram* filed, on the 31st of March, 1872, an inventory of the under-mentioned property, praying for their auction sale for the realization of the decadal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th, 1872, A. D., corresponding with 28th Assar 1279 Fusli, the auction sale of whatever rights and interests *Gooper Khan*, the judgment debtor, has in the property detailed below, will be commenced at noon in the place where the property is situated in pergunnah *Bhojepore*, zillah *Shahabad*. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his mokhtar, and purchase it. The rights and interests of other persons in the said property will not be sold by auction beside that of the judgment debtor." So there was an express notice that under the sale

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in execution of the decree only the rights and interests of the debtor were to be sold ; and it was also expressly pointed out that the rights and interests of other persons in the said property, other than those of the judgment creditor, would not be sold. Under that notification *Doolar Chand* and others, the Defendants in the two suits out of which this appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows : "On a petition having been filed for execution of a decree of the Civil Court passed by the Moonsiff of *Buxar*, zillah *Shahabad*, dated the 2nd of December, 1871, A. D., in suit No. 16, against the judgment debtor, and for the sale of his property, a sale notification was, under the order of this Court, issued, and the property sold at auction on the 25th of July, 1872. Whatever rights and interests the judgment debtor had in the said property were purchased by *Doolar Chand*," and so on. Those are the Defendants. "Hence, this certificate being made over to *Doolar Chand Baijnath* and *Ram Saran Sahoo, &c.*, the auction purchasers, it is proclaimed that whatever rights and interests the said judgment debtors have in the property aforesaid have ceased to exist from the 25th of July, 1872, the date of the auction sale, and become vested in the auction purchasers, *Doolar Chand Baijnath Sahoo* and *Ram Saran Sahoo*." Nothing then can be clearer than that both the perwannah and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them, save and except the rights and interests of the judgment debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act VIII. of 1869, the three sisters of *Gooper Khan* might have protected the tenure from sale, by satisfying, in accordance with the provisions of that Act, the decree of the Maharajah. The purchasers having been let into possession, *Chabeel Chand*, one of the Plaintiffs, purchased the interests of the three sisters. They were entitled to 8a. 4p. 16k. in this tenure, and the Plaintiff, *Chabeel Chand*, purchased that right, and he contended that under his purchase he was entitled to recover from the auction purchasers, under the Maharajah's decree, the 8a. 4p. 16k. which he

had purchased from the sisters. *Lalla Bisheshur Dyal*, who had purchased under the decree of *Ram Jeawan Singh*, also claimed that he was entitled to recover possession of what he had purchased under *Ram Jeawan Singh's* decree, and that he had purchased under *Ram Jeawan Singh's* decree the right, title, and interest of *Gooper Khan* previously to the sale under the Maharajah's decree. The Judges of the Lower Courts dismissed the claims both of *Bisheshur* and of *Chabeel Chand*. But the High Court reversed those decisions, upon the ground that *Dooli Chand* and others had purchased under the Maharajah's decree only the right, title, and interest of *Gooper Khan*. If they purchased the tenure they would have been entitled to retain possession, and the Plaintiffs would have failed in their suit. On the other hand, if they purchased merely the right, title, and interest of *Gooper Khan*, then in the one case *Chabeel Chand* was entitled to recover the 8a. 4p. 16k. share of the mouzah which he had purchased from the sisters, and *Bisheshur* was entitled to recover the other portion of the estate which he had purchased as the right, title, and interest of *Gooper Khan*. It has already been shewn what the nature of the sale in execution of the Maharajah's decree was, and their Lordships think that the High Court were right in the conclusion at which they arrived, that *Doolar Chand* and others, the Defendants in the suits, had purchased merely the right, title, and interest of *Gooper Khan*, and not the whole tenure free from all incumbrances and the rights of others who were interested therein.

Under these circumstances they are of opinion that the High Court was right in holding that *Chabeel Chand* was entitled to recover the 8a. 4p. 16k., and that *Bisheshur Dyal* was entitled to recover the interest which he purchased under the sale in execution of *Ram Jeawan Singh's* decree. The High Court however appear to have made a mistake. They appear to have been under the impression that *Gooper Khan*, instead of being entitled only to a 7a. 7p. 4k. share, was entitled to a 12 annas share in the property, and they accordingly gave *Bisheshur* a decree for a 12 annas share, as well as a decree to the other Plaintiff for an 8a. 4p. 16k. share. It is impossible that those two decrees can stand, because that would give a right to the two Plaintiffs to

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recover against the Defendant 20a. 4p. 16k. out of 16 annas. It is clearly an oversight, and Mr. *Doyne*, the learned counsel for *Bisheshur*, has admitted that the decree in *Bisheshur's* case was erroneous, and that instead of a 12 annas it ought to have been a 7a. 7p. 4k. share.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court in *Chabeel Chand's* suit be affirmed, and that in *Bisheshur's* case the decree be amended by ordering that he shall recover a 7a. 7p. 4k. share of the estate from the Defendants.

Their Lordships are also of opinion that the Respondents in both appeals are entitled to their costs.

Solicitor for Appellants : *T. L. Wilson.*

Solicitor for Respondents : *Henderson & Co.*

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Grant of Jaghir by the East India Company—Construction.

In 1800 a sunnud was granted by the *East India Company* to *N. K.*, which contained the following provision :—

" Under these circumstances it has appeared incumbent and proper, in the view of the chief authority (Hoozoor), that some suitable provision should be made as a subsidy for the expenses of *N. K.* and his descendants ; that is to say, by reason of close relationship, and being descended from the same ancestors as those of the Nawabs of the maritime city of *Surat*. Therefore this has been settled by the instrumentality of the Governor, as follows : *N. K.* with his children or descendants, after the deduction of the income of the jaghires according to the particulars given at the foot hereof, that is now in the possession of *N. K.*, shall receive from the Company's Government the sum of Rs. 24,000 per annum by four equal instalments. Hereafter should it be necessary for the Government to resume the above-mentioned jaghires, given on account of maintenance or otherwise, the amount of the

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income thereof shall be received by the above-mentioned Khan and his children or descendants from the Treasury of the Company."

M., a grandson and successor of *N. K.*, mortgaged some of the mehals comprised in the sunnad, the rents of which were thereafter collected by the mortgagee, and subsequently by the Government.

In an action brought after *M.*'s death against *F.* (his sister and successor), the Government, and certain descendants of *M.*'s sisters, for payment of the balance due upon the mortgage, it was contended that *M.* had only a life estate in the mortgaged mehals :—

Held, that on the true construction of the sunnud, and having regard to its objects and terms, each of the descendants of *N. K.* who took the jaghire, took it for life only.

A jaghire must be taken *prima facie* to be an estate for life.

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APPEAL from a decree of the High Court (Jan. 29, 1873), affirming a judgment of the Judge of *Surat* (April 13, 1869), by which the Appellants' suit was (save as to a sum of Rs. 1819 13a. 1p.) dismissed with costs. The suit was one to recover mortgage debts and interest, and to enforce certain securities for the same. The suit was instituted on the 10th of November, 1866, and sought to establish as against the Government of *Bombay*, represented by the Collector of *Surat*, as stakeholders, and against the second Respondent's predecessor in estate, *Fatima Begum*, who died *pendente lite*, and others beneficially interested, the right of the Plaintiffs to have certain mortgage debts, which were alleged to have been contracted by one *Mohinoodeen*, deceased, the half-brother of *Fatima*, and to have been by him made a charge on an estate or interest enjoyed by him, and called a "moglai huc," in certain villages in the district of *Surat*, satisfied out of the collections of that huc in the hands of the Collector, for a period as well after as before the death of *Mohinoodeen*, and, if necessary, by the sale of the huc. Several questions arose in the suit; but the principal one which was decided in this appeal was, as regards the second Respondent, viz., as to whether *Mohinoodeen* had, as the Plaintiffs contended, power to bind any other interests than his own in the huc in suit, and whether his interest extended beyond his own life.

The Courts below concurred in holding that *Mohinoodeen* had no power to bind *Fatima*'s interest, and that he had himself only a life interest, and dismissed the suit. The circumstances of the case appear in the judgment of their Lordships.

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Benjamin, Q.C. and Graham, for the Appellants.

Scoble, Q.C., and *Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This case, which has been argued necessarily at considerable length, in their Lordships' opinion resolves itself into the construction of a single document ; but in order to make the question which arises intelligible a short statement of fact is necessary.

In the year 1800, on the cession of *Surat* to the *East India Company*, the then governor of *Bombay* granted a sunnud to *Najamooddin Khan*, who was the commander-in-chief of the forces of the Nawab, and was called the Buckshee. That document was dated the 22nd of June, 1800. Their Lordships think they are bound to accept the only translation of it in the record which appears to be properly authenticated, although a somewhat different version of a passage in it is to be found in the judgment of the subordinate Judge. After reciting that whereas by virtue of a compact and a convention made between the Government of the *East India Company* and the then Nawab, dated the 12th of May, 1800, to which also the seal of *Najamooddin Khan* had been affixed by way of attestation—*Najamooddin* being the person above referred to as the Buckshee—the management and collection of the land revenue, &c., of *Surat*, and the administration of the city, has been delivered over to the *East India Company*, the sunnud proceeds as follows : “ Under these circumstances it has appeared incumbent and proper, in the view of the chief authority (Hoozoor), that some suitable provision should be made as a subsidy for the expenese of the above-named *Mir Najamooddin Khan* and his descendants ; that is to say, by reason of close relationship, and being descended from the same ancestors as those of the Nawabs of the maritime city of *Surat*. Therefore, this has been settled by the instrumentality of the governor, who is the ruler of the maritime city of *Bombay*, &c., as follows :—That *Mir Najamooddin*, with his children or descendants, after the deduction of the income of the jaghire according to the particulars given at the foot hereof, that is now in the possession of the above-mentioned

Khan, shall receive from the valiant English Company's Government the sum of Rs.24,000 per annum by four equal instalments, commencing from the 15th of the month of May, corresponding with the 21st of Zilhaj in the above-mentioned year. Hereafter should it be necessary for the Government to resume the above-mentioned jaghire, given on account of maintenance or otherwise, the amount of the income thereof shall be received by the above-mentioned Khan, and his children or descendants, from the Treasury of the valiant English Company." There is a further provision that "on account of the merit and laudable qualities of the above-mentioned Khan, he is to receive during his lifetime Rs.6000 per annum by four equal instalments ;" and then are appended the particulars of the Jaghire, consisting of nine mehals, the revenue from which altogether amounts to Rs.6264. 4a. It has been said that another sunnud or other sunnuds of the same kind were given at the same time relating to other jaghires. That may have been so, but in their Lordships' view the question to be considered would not thereby be altered.

Najamooddin on his death was succeeded by his son *Sudrooddin*. *Sudrooddin* on his death, in the year 1826, was succeeded by his son *Mohinooddin*, at that time sixteen years of age. *Fatima*, one of the sisters of *Mohinooddin*, was seven years old. There were also other minor children, and sisters and a widow of *Sudrooddin*. In 1828, *Mohinooddin* executed a mortgage to a banking firm—whose representative is the Plaintiff in the present action—of some of the mehals in the schedule to the sunnud, on behalf not only of himself but of his brother *Ameenooddin*, a minor aged eleven years (who died soon after), "and on behalf of his minor sisters on his father's side" (including *Fatima*), "and as agent having full power in respect of all matters below-mentioned on behalf of his step-mother and step-sisters, and other heirs" of *Sudrooddin*. The mortgage was to secure repayment of an advance of Rs.39,000. There is a power of redemption at the end of five years, and other stipulations customary in mortgages of this kind, and a provision that the banking firm shall receive the proceeds of the mehals either through the sircar or by collecting them themselves. In the year 1845 *Mohinooddin* executed another mortgage, professing to act on his own behalf only, confirming the previous mortgage

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of 1828, and further charging the property mortgaged for the repayment of another sum of Rs.1000, which he then borrowed. It would appear that the banking firm up to the year 1840 themselves collected the rents of the villages; but in 1840 the Government made an order whereby they took the collection into their own hands, paying over the rents—with some interruptions which it is not now material to consider—to the banking firm under a mooktearnamah so directing executed by *Mohinooddin* until the year 1857, when they ceased making the payments upon receiving a letter from *Mohinooddin* stating that the mortgage had been satisfied, and prohibiting any further payments being made. In the year 1860 *Mohinooddin* died, and was succeeded by his sister *Fatima*, who received the income of the jaghire, and was recognised as Buckshee by the Government.

In the year 1866 the present action was brought by the then representative of the banking firm against the Collector of *Surat*, *Fatima*, and three other persons, descendants of the sisters of *Mohinooddin*, of whom one has died and two have disclaimed, and with regard to whom therefore no question arises. The claim is in substance for an order against the collector, that he do pay the revenue of the villages to the Plaintiff, as mortgagee, the contention being that the mortgage bound the property in the hands of *Fatima*; and against *Fatima* for the payment of a lac of rupees minus one, alleged to be due for interest and principal upon the mortgage. The answer of the Collector is that he has a sum in his possession which he pays into Court, and that this is all which he had in the lifetime of *Mohinooddin*, after satisfying certain other creditors, and he denies his liability to make any payments to the Plaintiffs after the death of *Mohinooddin*.

Fatima answers, among other things, that *Mohinooddin* had only a life estate in the property, and therefore could not charge it beyond the term of that estate, and it is upon that answer of *Fatima* that the question in the cause arises. Both of the Courts in *Bombay* have found in favour of the Defendant, that *Mohinooddin* had only a life estate. The same finding has also been come to in another suit brought by other creditors against *Fatima*, in the High Court of *Bombay*, decided in 1874, in which the same question arose, and which has not been appealed against. The

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Appellants now contend that all these decisions are wrong, and that *Mohinooddin* took an absolute estate.

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This question depends upon the construction of the sunnud ; but that construction may be aided by a consideration of the surrounding circumstances, and of the occasion on which it was granted. The circumstances under which it was granted appear to be clearly and sufficiently set out in a minute of the then Governor of *Bombay*, which is referred to in the judgment of Mr. *Kemball*, the subordinate Judge, and is in these terms :—“Besides these official advantages, the Buckshee had for many years past been in the possession of various jaghires ; that his relations, the Nabobs of *Surat* ; at different times (but all above twenty years ago), alienated in his favour from various parts of the mogullae or assigned revenues on the neighbouring pergunnahs for the support of the nabobship, in like manner as they have (as far as depended on them) done to various other individuals. These estates or assignments, which the Buckshee appeared to be very desirous of retaining, amount yearly, according to the valuations expressed in the pergunnahs or grants, to Rs.16,810, respecting which the present Nabob declared, on being separately consulted, that he considered them as having from the original grants and the length of possession become the Buckshee’s property; on all which grounds I have settled that, including the said jaghires, the Buckshee shall receive from the Company an annual stipend of Rs.30,000, to be continued to his children and family after his decease at the reduced rate of Rs.24,000, with a clause inserted in the grant in conformity to the instructions to that effect from the most noble the Governor General in Council ; that in event of its becoming expedient for Government to resume the jaghires the parties shall be satisfied to receive their value of produce from the Treasury in like manner with the residue of their pension.”

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The terms of the sunnud are in accordance with this minute. It appears to their Lordships that it was the intention of the *East India Company* not merely to give a reward to the Buckshee for any personal services which he had rendered (a reward which he would be able to dispose of as he thought fit), but to make a permanent provision for the maintenance of an important family in *Surat*. This object is indicated by the expression “ by reason of

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close relationship and being descended from the same ancestors as those of the Nawabs of the maritime city of *Surat*." The specific benefit given to the individual for his own services is subsequently stated as Rs.6000 per annum, in addition to that which was intended for the permanent maintenance of the family.

It has been argued on the part of the Appellants that this sunnud was not a grant of a jaghire, but merely a confirmation to the Buckshee of a jaghire which he before held by hereditary tenure, and had power to alienate ; and that this grant ought not to be construed as cutting down his rights. But it appears to their Lordships that the foundation of this argument fails the Appellants. They agree with the High Court that a jahire must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary. There is no evidence that the jaghires held by the Buckshee had come to him from his ancestors or were hereditary. On the contrary, they appear to have been granted to himself, although more than twenty years before the date of the sunnud, and there is no statement that they were granted on terms which would make them hereditary. It is true that the Nawab speaks of them having belonged to the Buckshee so long that they might be considered as his property, but their Lordships cannot regard this statement as anything more than a recognition that in all probability upon his death the jaghires might, as no doubt was often the custom, have been continued to his heirs or to some of his successors by the native government, possibly on the payment of a fine ; and they agree with the High Court, that, so far from the presumption being that the Buckshee had an hereditary and alienable estate, the presumption is the opposite.

That being so, their Lordships do not regard the grant as cutting down his right, but as extending it so that his successors would be necessarily treated as the owners of the jaghire unless and until resumed ; but having regard to the object and terms of the grant, they have come to the conclusion that each of the descendants of the Buckshee, who took the jaghire, took it for life only.

It should be observed that the main object of the grant is to secure a pension (that is the proper term for it) of Rs.24,000 per

annum to this family. A portion of that pension is to be paid out of the revenues of certain mehals constituting the jaghire stated in the schedule ; the proceeds of the jaghire are thus in effect but a part of the pension. It has been scarcely contended on the part of the Appellants that the pension was alienable. But, if the pension was unalienable, and the jaghire was alienable, this conclusion would appear to follow. If the jaghire had been sold, and the Government had at any time chosen to resume it, as they expressly reserve to themselves power to do, they would have been obliged to pay to each of the purchasers of the mehals constituting the jaghire, who would be strangers, and to their successors in perpetuity, a portion of the pension of Rs.24,000 per annum granted especially for the support of the family of *Najamoodin*. It appears to their Lordships that this result cannot reasonably be supposed to have been contemplated at the time the sunnud was entered into, unless it was contemplated that the whole of the Rs.24,000 by way of pension should be alienated, a supposition wholly inadmissible.

On the whole, therefore, their Lordships, having regard to the peculiar character of this grant from the Government under the circumstances which have been related, and with the objects which it expresses, have come to the conclusion that the Court of *Bombay* was right in treating it as conferring upon the descendants of *Najamoodin*, who would be entitled under it, an estate for life and for life only.

Their Lordships having come to this opinion on the grounds above stated, do not think it necessary to refer at length to some cases which have been quoted, having little bearing upon the present. They may observe that the case which was referred to, *Rjah Nursing Deb v. Roy Koylasnath and others* (1), decided no more than that where a zemindar had made a grant vesting property in the grantee and his descendants from generation to generation,—terms well known in *India* as conferring an hereditary estate, that hereditary estate was not cut down and made unalienable merely by a direction that certain persons should be maintained. Their Lordships may observe that this was a grant from a private individual, and they are not prepared to affirm that all the

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considerations applicable to grants from private persons apply to grants from the State. It should be borne in mind that the present is not the case of the State merely granting a jaghire, and declaring that that grant shall be hereditary, but it is a grant of a jaghire accompanied with the grant of a pension, under circumstances which indicate that the intention was that the grant of the jaghire and the grant of the pension should be subject to the same conditions.

A case has also been referred to, decided in the North-Western Provinces, of *Bithul Bhut v. Lalla Raj Kishore and others*, (1) with reference to which their Lordships think it enough to say that the decision there turned upon the construction of regulations which had force in the North-Western Provinces, but have no application to *Bombay*, and further, that the grant in that case was the grant of a private person.

The only further question which has been argued is whether *Fatima* ratified the execution of the mortgage by her brother *Mohinooddin* after she became of age, and if so, what is the effect of that ratification. Upon this subject their Lordships think it enough to say that they see no reason for differing from the conclusion which the High Court have come to, upon what is in a great measure a question of fact, viz., that she did not ratify that execution with knowledge of her rights, and that therefore she cannot be bound thereby.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this appeal dismissed with costs, such costs to include the costs of both Respondents.

Solicitors for the Appellants : *Ashurst, Morris, Crisp, & Co.*

Solicitors for the Respondents : *West, King, Adams, & Co.*

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DEPUTY COMMISSIONER OF LUCKNOW } DEFENDANT. *Jan. 22, 23.*
IN CHARGE OF THE NAZUL DEPARTMENT }

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.

*Effect of the Confiscation in Oudh—Lord Canning's Proclamation of 1858—
Effect of Re-grant of Confiscated Estate.*

The effect of Lord Canning's proclamation of the 15th of March, 1858, was to divest all the landed property from the proprietors in *Oudh*, and to transfer it to and vest it in the British Government. Consequently all who since that date claim title to such property must claim through the Government.

Where a regrant is made to a former owner the new title will depend entirely on the terms of the re-grant, and if such re-grant is made for life only, no suit can be maintained to rectify an alleged mistake, and for declaration of an absolute title according to the tenor of the sunnuds by which the property was held under the old dynasty and prior to the confiscation.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Jan. 4, 1876), which confirmed a decree of the Commissioners of *Lucknow* (May 1, 1875), who reversed the original decree of the Civil Court of *Lucknow* (Jan. 8, 1875), whereby the Plaintiffs' suit was decreed.

In the Hijri years corresponding to 1839 and 1840, the then King of *Oudh*, *Mahomod Ali Shah*, executed to the Appellant, his wife, four several "farmans" or grants, by which he conferred upon her "and her descendants in perpetuity, generation after generation," the properties in suit, as well as some other properties, consisting of certain Government palaces and buildings in *Lucknow*, called a baradari, serai, &c., of considerable extent and value. There was no question as to the genuineness of those farmans, which were admitted in Court by the Government pleader in the course of the case, and thereunder the Appellant was and

* Present :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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continued in undisturbed possession of the subjects of those grants down to the year 1858, her right thereto not having been questioned by the successor of her husband on the throne, nor by the British authorities upon the first annexation of the province of *Oudh*.

After the reduction of *Oudh* Lord Canning's proclamation (1) was issued, apprising the "talookdars, chiefs, landholders of *Oudh*, and their followers," of the liability of their lands to confiscation, and of the intention of the Government in the case of those who should come in and support the Chief Commissioner to "be ready to view liberally the claims which they might thus acquire to a restitution of their rights."

This was followed up by two notices or proclamations of the Chief Commissioner, Sir James Outram, of the 22nd and 25th of March, 1858, addressed, the first to the inhabitants of the city of *Lucknow*, and the other to the landholders, with reference to Lord Canning's proclamation.

By the first of these the inhabitants of the city, who had fled away after locking up their houses, were informed that unless they returned and reoccupied their houses within ten days, their houses would be confiscated, and by the second, the landholders were informed that if they would come in at once no lands would be confiscated under the proclamation, unless where atrocities on helpless Europeans had been committed.

What occurred subsequently appears from a number of official letters, the material portions of which are set out in their Lordships' judgment.

The object of the suit was to obtain a declaration of the Appellant's absolute title to certain houses and premises in *Lucknow*, on the ground that her deceased husband, the then King of *Oudh*, had absolutely conferred them on her, and that the action of the Government of *Oudh*, represented by the Respondent, in seeking to reduce her interest to one for life, was unjust and wrongful.

The First Court held that the Plaintiff had an absolute and subsisting hereditary right, and was entitled to a decree as prayed establishing her absolute interest.

The Second Court held that the acts of the Government of

(1) See *post*, p. 74.

Oudh complained of were acts of State not cognizable in a Municipal Court.

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The judicial Commissioner held that the suit was barred by limitation.

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Cowie, Q.C., and *Doyne*, for the Appellants, contended that the absolute and hereditary interest which the Appellant took under the grants from the King of *Oudh* was not in fact reduced nor affected by any act of State in 1858, or subsequently. It had nowhere been contended that there was any existing cause of confiscation, either on the ground of her having committed any crime, or of her having failed to come in under Sir *James Outram's* proclamation. Consequently at that time there was no act of State exercised against her which worked or was intended to work a confiscation of any rights which she previously had. Was the effect of Lord *Canning's* proclamation to make a *iabula rasa* in regard to all pre-existing titles, which would allow the Government to deal at discretion with all the property to which it referred? The summary settlement was resumed on the footing of a remitter of forfeiture to those who were not mixed up in the rebellion. [SIR MONTAGUE E. SMITH:—Here the facts are against you, the Government only recognise a jointure right]. That proceeded upon a mere mistake as to the Appellant's rights. Directions had been given to respect pre-existing rights, and the Appellant had always remained in possession. The letter of the 8th of April was not intended as a violation of the assurance contained in the proclamation of the 25th of March. It meant that properties which had belonged to the ex-king would pass from him to his successors, the *East India Company*, and not that where valid grants had been made long before by a previous king of royal lands, such should be resumed and confiscated. If Mr. *Campbell* went beyond this direction, his doing so did not constitute an act of State, but was wholly *ultra vires* and of no effect. Consequently, no period of limitation runs against the Appellant from any of the orders made in 1858-9, none of which were acts of State as against her. The Judicial Commissioner decided the case on the ground of limitation, which shews that he considered the act of State no longer applied to it. The suit is for a declara-

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tion of right in order to remove the cloud cast upon the Appellant's title under the orders and action of the Government of *Oudh*. The effect of those orders was to involve in much peril her capacity to alien absolutely in her lifetime, if so minded, the premises in suit, and the title of her heirs-at-law upon her death.

Leith, Q.C., and *J. D. Mayne*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

The material facts in this case may be shortly stated. The Plaintiff was one of the widows of a king of *Oudh*, *Momuddin Mohammad Ali Shah*, who occupied the throne some time before the annexation of *Oudh*. In the years 1839 and 1840 this lady had four sunnuds from the King, granting to her a large tract of land within the city of *Lucknow*, comprising royal palaces, gardens, houses, and shops. The form of those sunnuds, which are substantially (if not in words) the same, is this :—“ We have graciously been pleased to grant to *Malka Jahan Nawab Tajun Nissan Begam*, according to the details herein given, the baradari on the road, together with the mohul sarai belonging to Government, containing an area of 38,330 square yards, situated in *Tilpura alias Dowlat-pura*, a mohalla of *Lucknow* city, which is the seat of Government. All the civil clerks, government officers, and daragas, present and future, are directed to transfer the said houses to the possession of the said begam and her descendants in perpetuity, generation after generation, to see that this command is durably executed, and to give no annoyance by demanding any tax. Neither shall they call for a fresh deed year after year.”

On the suppression of the mutiny in *Oudh* the well-known proclamation of Lord *Canning* was issued on the 15th of March, 1858. That proclamation, among other things, contains these words :—“ The Governor-General further proclaims to the people of *Oudh* that, with above-mentioned exceptions” (in favour of certain loyal talookdars), “ the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.” It proceeds :

"To those talookdars, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of *Oudh*, surrendering their arms and obeying his orders, the Right Honourable the Governor-General promises that their lives and honour shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government. To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of their former rights." It does not appear either that the Plaintiff took any part in the rebellion or that she promptly came forward and gave her support for the restoration of peace and order.

Their Lordships have before now had occasion to express the opinion, to which they adhere, that the effect of the proclamation was to divest all the landed property from the proprietors in *Oudh*, and to transfer it to, and vest it in, the British Government.

There followed two proclamations of Sir *James Outram*, dated respectively the 22nd of March, 1858, and the 25th of March, 1858. The first is in these terms :—" It is hereby notified for those who have fled away from the city, having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property with their houses will be confiscated." The second, addressed to the landholders, runs thus :—" The Major-General, Chief Commissioner of *Oudh*, in sending you this proclamation, wishes to inform you that if you at once come in ready to obey his orders, provided you have taken no part in the atrocities committed on helpless Europeans, none of your lands will be confiscated, and your claims to lands held by you prior to annexation will be heard." These proclamations of General *Outram* cannot be taken as changing the effect of the proclamation of Lord *Canning*, or having any operation, in as far as they may be inconsistent with it. Certainly they could not have the effect of divesting any property from the British Government which had been

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vested in it. The object of General *Outram*, doubtless, was to exhibit a conciliatory policy to those who should promptly come in and tender their submission to the British Government.

The next document that it is necessary to refer to is a letter of the 8th of April of the same year, addressed by the Secretary of the Chief Commissioner of *Oudh* to Mr. *George Campbell*, who was then the Judicial Commissioner of *Oudh*, in these terms :—“Sir, the Chief Commissioner requests that you will consider the Nazul Department as under you, and that you will at once order lists to be made out and carefully prepared of all Nazul property.” (Nazul property being State property, which had accrued to the State from forfeiture, lapse, or any other cause). “The houses and gardens of all rebels should be *prima facie* entered in the lists, and can be restored or not, as may hereafter appear expedient. The property of the late royal family will necessarily all come within the lists.”

It has been contended on the part of the Appellant that for “royal family” should be read “king,” but their Lordships do not adopt that construction. The question is, what was done by the Government? And looking to this document, coupled with others which will be referred to, it appears to their Lordships that the intention of the Government, which was carried into effect, was to put upon the Nazul register all the property which in any sense could be considered property of the royal family, or royal property, including the property in question.

The next document to be referred to is a letter of the Judicial Commissioner of *Oudh* to the Commissioner and Superintendent, *Lucknow* Division, dated the 26th of July, 1858. “Sir, in settling what buildings, &c. are to be retained as Nazul and what restored to the former possessors it will be necessary to distinguish between estates made over in full proprietary right to the proper owners, and those which are in fact Nazul as belonging to the former Government, but are held as residences by the begams and others connected with the Court. The latter are clearly not transferable, but will in most instances eventually lapse to Government, and I trust that you will see that the distinction is maintained. For instance, the great palace hitherto held by the Begam *Malka Jahan* is evidently a mere jointure house in which she lived when

all *Lucknow* was in possession of the Court, but it is in no way her private property, nor can it be said that her house has been taken from her. She is merely, in the altered circumstances of *Lucknow* and of the royal family, the occupation of British troops and destruction of so many buildings, assigned accommodation more reasonable and moderate than the enormous palace of other times. In other cases similar arrangements may be made so that those who have lost all by the demolitions may be provided for and those who happen to escape may not unreasonably monopolise the accommodation to the exclusion of others. In the *Nazul* list there should be first statement of estates in immediate possession, and second, statement of those in which the *Nazul* has a reversionary interest." It would seem that the Deputy Commissioner acted upon this letter of the Judicial Commissioner, for we find this account of "Proceedings of the Collector's Office of the *Lucknow* District recorded by Mr. *Simson Nicholas Martin*, Deputy Commissioner, on the 3rd of August, 1858, A letter dated the 25th of July, 1858, No. 212, giving cover to Judicial Commissioners' letter No. 206, dated 26th *idem*, has been received from the Commissioner directing a distinction to be made in the *Nazul* Register between those houses which are in reality *Nazul*, but which were given to begams to live in; for instance, the large house which was formerly in the possession of *Malka Jahan*, the Judicial Commissioner says that this house certainly belonged to the king, and was given by the King of *Oudh* to the begam merely to live in. Where such is the case a note will be entered in the column of remarks to the effect that the house will be regarded as *Nazul* property after the death of the party at present in possession. Ordered that an injunction be issued to the *Nazul* Daroga, directing him to make the required note in the column of remarks where such a large house is in the possession of any begam." Whether or not that entry in the *Nazul* was immediately made is not very clear: it would perhaps be the better opinion that it was made subsequently in June 1859, because on the 2nd of June, 1859, we find the following letter from Mr. *A. Abbott*, the Commissioner and Superintendent, to the Deputy Commissioner. "With reference to your letter No. 598, dated 23rd ultimo, I have the honour to forward for your information and guidance the

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annexed copy of a letter, No. 1049, dated the 31st *idem*, from the Secretary to the Chief Commissioner sanctioning the grant to *Mohsan-ud-dowla* of that portion of the house of *Malka Jahan* made over to him by the Judicial Commissioner in full satisfaction of all claims on account of houses demolished, and to request that you will file an acknowledgment of the Nawab to the effect stipulated, and see that that portion of the premises in the occupation of *Malka Jahan* is in the Nazul list. The building was declared Nazul by the Judicial Commissioner in his letter No. 206, dated the 26th of July, 1858, declaring *Malka Jahan* to have only a life interest in it. On her death it will lapse to the Government."

Probably an entry to that effect in the Nazul list was then made. The allusion to *Mohsan-ud-dowla* in this letter is thus explained. The Government determined to allow the Plaintiff to reside in a large portion of the great aggregation of buildings, but they thought fit to give a portion of it to *Mohsan-ud-dowla*, who appears to have deserved well of the Government, in lieu of certain property of his which had been taken for military purposes. Whether or not the Plaintiff assented to this division between herself and *Mohsan-ud-dowla* may be questioned, but is not material. She does not in the present action claim that portion of the palace which was assigned to *Mohsan-ud-dowla*.

A good deal of correspondence was read which took place about this time, and their Lordships infer from it that although there does not appear to be any distinct and formal entry of a notification having been given to this lady that she would be allowed to remain only as occupier for life of the premises, she must have been aware of the terms on which the permission was granted. Indeed, she appears on one occasion to have been heard by her mooktear before the Commissioner or the Deputy Commissioner to state her case.

About this time the lady went on a pilgrimage and remained absent for several years, leaving the palace in the possession of her servants in the interim. Upon her return, some time in 1865, she made a claim for the whole of the palace, and that claim is thus dealt with by the authorities. The Under-Secretary to the Government of *India* writes thus to the Chief Commissioner of *Oudh*,

from *Fort William*, on the 22nd of February, 1866, "Sir,—In reply to your Junior Secretary's letter, dated 10th instant, No. 563, reporting on the claim of *Malka Jahan* Begam to the whole of the buildings known as 'Malka Jahan's Estate,' I am directed to intimate that the Governor-General in Council, concurring in your view of the case, declines to recognise the claim advanced by the begam, and desires that she may be informed accordingly."

In the next year she again pressed her claim, and we have, on the 26th of July, 1867, another letter from the Secretary of the Governor-General to her attorneys, in these terms, "Gentleman, in reply to your letter dated the 1st of March last, submitting a petition from *Malka Jahan*, in which she lays claim to the house at *Lucknow* known as 'Aga Mir Ki Deorlu,' a portion of which has been made over to *Nawab Mohsan-ud-dowla*, I am directed to inform you that the Governor-General in Council, after careful inquiry, sees no reason to modify his previous orders respecting this claim."

The lady appears to have taken no steps in the matter for six years after this, but on the 7th of May, 1873, she presented a petition to the Commissioner of the *Lucknow* Division, asserting her right to the premises in perpetuity, and requesting the Government to allow it. She goes on to say: "That certain farmans, bearing the royal stamp, relating to the grant of the said houses, are in my possession, which corroborate the fact that these houses were granted to me as my permanent and transferable property for generation after generation. Notwithstanding all this a strange thing has happened, that on the arrival of a letter from your honourable Court, the said houses have been inserted to the *Nazul Register* under the hypothesis that the King of *Oudh*, my deceased husband, has granted me the houses for occupation for life only." Then she says: "As I had proceeded on pilgrimage to 'Karbala,' therefore no steps could be taken from my side to regulate this error. Whereas the groundlessness of this hypothesis will be developed to you even by a perusal of the above-mentioned farmans, in which it is specifically recorded that the proprietary and transferable right of the houses has been given to me for perpetuity." Then she goes on to say: "It is, therefore, essentially necessary and equitable to correct this mistake by striking off the words 'for occupation only'"—which

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are in italics and inverted commas—"from the *Nazul Register*, because by the existence of such a mistake a considerable loss shall be sustained by me, my heirs, and relatives, whose maintenance and protection are incumbent on Government, in compliance with the testamentary contracts of the late king, my husband. In conclusion I respectfully beg that after the perusal of the farman, and making other necessary inquiries, you will be humane enough to correct this mistake, by making known generally that this property may remain exempt from all interference after me as it now is." On the 18th of September following, she seems to have sent copies of these *farmans*, with a petition (not set out in the Record) which the Commissioner thus deals with on the 18th of October : "Read a petition dated the 18th of September, 1873, from Nawab *Malka Jahan*, submitting certain sunnuds, with a view to their genuineness being tested. Ordered that the sunnuds be returned to Petitioner, with the remark that officiating Chief Commissioner has no power to inquire into their validity. If she has any doubts on the subject she had better apply to the Civil Court for a declaratory decree, or such other legal advice which the officiating Chief Commissioner is not competent to give."

Thereupon she brings the present action on the 30th of March, 1874. The plaint claims a declaration of Plaintiff's absolute title in the premises, describing them. It states, "That the plaintiff has been in absolute proprietary possession of the above houses by virtue of the aforesaid grants for last thirty-six years; that in 1858 the Defendant by proceedings dated the 3rd of August, 1858,"—that is the memorandum which has been referred to of the proceedings in the Collector's Office in *Lucknow*, acting on the letter of Sir *George Campbell*,—"declared that the Plaintiff had a life interest in the houses aforesaid, which were to lapse to the *Nazul Department* on the death of the Plaintiff, the present holder, as a property of the ex-king of *Oudh*. That the Plaintiff in 1873 presented a memorial to the Local Government setting forth her legal title to the aforesaid houses, on the strength of the royal grants mentioned above, and prayed for the rectification of the mistakes committed by the *Nazul Department* in respect of the ownership of the aforesaid houses, whereupon she, the Plaintiff, was directed to seek redress in the Civil Court, *vide* Chief Commissioner's No. 581, of the 28th of October, 1873, herewith

inclosed. Plaintiff therefore sues for the declaration of her title in the houses aforesaid as the absolute owner thereof." She further asserts that the cause of action arose when she presented her last petition, and the Government refused to act upon it.

The Deputy Commissioner pleads first that the "suit is barred by limitation. The palace having been declared to be a State building in 1858, and plaintiff having been then informed that it was in no way her private property, and that she was allowed to occupy a portion of it as a jointure house," and then he refers to the letters and proceedings which have been read. "The suit in its present form is inadmissible. Plaintiff really wants consequential relief of a most valuable nature, and hence the suit should be brought on full stamps. The sunnuds relied upon are of no force opposed to the declaration of Government after re-occupation, that the palace was State property and the fact of Government having dealt with it as such. For these reasons the suit should be dismissed, with costs."

The suit was first heard by Mr. *Lincoln*, the Civil Judge, who, gave judgment in favour of the Plaintiff. An appeal was preferred to the Commissioner, who gave judgment for the Defendants, on the ground that the act which was complained of, and sought to be set aside, was an act of State, and could not be taken cognizance of in a civil Court. On further appeal to the Judicial Commissioner, he affirmed the judgment on the ground that the claim was barred by limitation, and this is the judgment now appealed against. The Commissioner appears to have supposed that Sir *George Campbell* and the officers who dealt with this property at *Lucknow* were acting under Regulation XIX of 1810, sect. 7, which enacts that the general superintendence of all Nazul property is vested in the Board of Revenue. Their Lordships think it right to observe that this regulation, which was never extended to *Oudh*, was clearly not the authority under which they acted; their authority was the proclamation of Lord *Canning*, and the other proceedings of the Government which have been referred to.

Their Lordships are of opinion that this suit cannot be maintained. The proclamation of Lord *Canning*, as has been before stated, had the effect of vesting the property, the subject of the suit, together with all other landed property in *Oudh*, in the British

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Government, and all who claim title to it must claim through the Government. The question then is, what interest, if any, has been granted or allowed to this lady by the Government? Their Lordships do not think it necessary to determine the effect of the construction of the sunnuds under which she formerly held, whether they would, if *Oudh* had remained under the old dynasty, have conferred upon her a life interest or an interest in perpetuity. It does not distinctly appear whether or not these sunnuds were called to the attention of Sir *George Campbell*, acting as the Nazul officer of the Government; but whether they were, or were not, or whether Sir *George Campbell* took a right or a wrong view of what the lady's rights were before the proclamation of Lord *Canning*, appears to their Lordships immaterial. Those rights, whatever they were, were confiscated, and the sole question is, what interest, if any, was regranted to her? Looking at the whole of the proceedings which have been quoted, it appears to their Lordships abundantly clear that no more was granted to her than a permission to occupy the palace for her life. If the acts which she seeks to impugn on the part of the officers of the Government were nullities, it would follow she has no interest at all, but that her property remains in the British Government to which it was confiscated.

Their Lordships may further observe that this being a declaratory suit, it is clearly not maintainable on the ground that no possible relief could be given. The suit thus failing on two grounds, it is not necessary to enter into the question of the *Statute of Limitations*. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Judicial Commissioner dismissing the suit be affirmed, and this appeal dismissed, with costs.

 LORD CANNING'S PROCLAMATION OF 15th MARCH, 1858.

" PROCLAMATION.

" The army of His Excellency the Commander in Chief is in possession of *Lucknow*, and the city lies at the mercy of the British Government, whose authority it has for nine months rebelliously defied and resisted.

" This resistance, begun by a mutinous soldiery, has found support from the inhabitants of the city, and of the province of *Oudh* at large. Many who owed their prosperity to the British Government, as well as those who believed themselves aggrieved by it, have joined in this bad cause, and have ranged themselves with the enemies of the State.

"They have been guilty of a great crime, and have subjected themselves to a just retribution.

"The capital of their country is now once more in the hands of the British troops.

"From this day it will be held by force which nothing can withstand, and the authority of the Government will be carried into every corner of the province.

"The time, then, has come at which the Right Honourable the Governor-General of *India* deems it right to make known the mode in which the British Government will deal with the talookdars, chiefs, landholders, of *Oudh* and their followers.

"The first care of the Governor-General will be to reward those who have been steadfast in their allegiance at a time when the authority of the Government was partially overborne, and who have proved this by the support and assistance which they have given to British officers.

"Therefore the Right Honourable the Governor-General hereby declares that *Drig Byjai Singh*, Rajah of *Bairampur*, *Kulwant Singh*, Rajah of *Pudnaba*, *Rao Hardeo Bux Sing*, of *Katiari*, *Kashiparshad*, talookdar of *Sissendi*, *Jahar Sing*, zemindar of *Gopal Khan*, and *Chande Lal*, zemindar of *Maurawan (Baiswara)* are henceforward the sole hereditary proprietors of the land which they held when *Oudh* came under British rule, subject only to such moderate assessment as may be imposed upon them, and that these loyal men will be further rewarded in such manner and to such extent as upon consideration of their merits and their position the Governor-General shall determine.

"A proportionate measure of reward and honour, according to their deserts, will be conferred upon others in whose favour like claims may be established to the satisfaction of the Government.

"The Governor-General further proclaims to the people of *Oudh*, that with above-mentioned exceptions the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.

"To those talookdars, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of *Oudh*, surrendering their arms, and obeying his orders, the Right Honourable the Governor-General promises that their lives and honour shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government.

"To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of their former rights.

"As participation in the murder of English men or English women will exclude those who are guilty of it from all mercy, so will those who have protected English lives be specially entitled to consideration and leniency."

Solicitors for the Appellant : *Watkins & Lattey*.

Solicitor for the Respondent : *The Solicitor of India Office*.

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 Nov. 15, 16. NAWAB AFSUR BAHU BEGUM . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF
 LUCKNOW DIVISION, OUDH.

*Effect of Lord Canning's Proclamation—Houses in Lucknow—Abandonment of
 Confiscation—Limitation.*

By Lord *Canning's* proclamation of the 15th of March, 1858, all the proprietary rights in the soil of *Oudh* were confiscated ; and therefore in any suit to recover a mouzah situated therein, the Plaintiff must shew a title acquired within twelve years previously by some grant or proceeding of the Government subsequent to that proclamation.

As to the effect of Lord *Canning's* proclamation and of Sir *James Outram's* proclamation dated the 22nd of March, 1858, with reference to houses in *Lucknow, quare*. But it appearing in reference to the houses in suit that it was the intention of the Government to abandon altogether the confiscation, and to leave the former owners to their rights in the same way as if there had never been any confiscation :—*Held* that on a plea of limitation by Defendant in ejectment, alleging possession prior to the proclamations, the issue must be tried and determined in the same manner as if there had never been any confiscation at all.

Issues settled accordingly, and case remanded.

APPEAL from a decree of the Court of the Commissioner (Jan. 22, 1876) dismissing an appeal against that of the Civil Judge of *Lucknow* (Aug. 16, 1875). Both Courts dismissed the Appellant's suit for a share in certain immovable properties as barred by limitation.

The nature of the action and the facts of the case are set forth in the judgment of their Lordships.

The following were the issues in the case:—

“1.—Limitation?

“2.—Is the value of the property exaggerated?

“3.—What is the amount of the mesne profits from 1863 to 1875?

*Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

“ 4.—Is the Defendant to receive anything ? If so, to what extent, on account of sums expended in procuring the release of the property ?

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“ 5.—Is the suit barred by sect. 7, Act VIII of 1859 ?

“ 6.—Is the suit for mesne profits barred by clause 15, sect. 83, Act XIX of 1860 ?

“ 7.—Was the property gifted to the Defendant ? If so, was it valid ?

“ 8.—Was the property confiscated by the British Government for the complicity of the Defendant in the rebellion and released ? If so, on what conditions, and would these conditions have the effect of altering the status of the party in the property, and extinguishing all prior claim thereto which the Defendant may have had by reason of a gift ?

“ 9.—What share has Plaintiff by Mahomedan law ?

“ Note.—This issue involves several points, the first is, whether the cause of action accrued in 1858, the death of *Mulka Kishore*, or whether the cause of action arose in 1863, the date when the British Government released the property ; thirdly, whether the Defendant was in possession of the property after *Mulka Kishore's* death.”

The judgment appealed from was as follows :—

“ This claim was brought by Plaintiff for two-thirds of the estate, and mesne profits for past years, of the late *Mulka Kishore*, the grandmother of the claimant.

“ The property consists partly of immoveable property in *Lucknow* and partly of revenue-paying lands in *Una*.

“ *Mulka Kishore* died in February, 1858, in *Europe*, and General *Sekundar Husmutt*, father of Plaintiff, a month or so later, i.e., some time in March, 1858.

“ On the capture of *Lucknow* in March, 1858, the *Lucknow* property was taken possession of by Government, and held till 1863, when the Chief Commissioner, in his Secretary's letter, No. 1556, dated the 6th of July, 1863, directed that Government should relinquish possession, but not in favour of Defendant, Respondent, or any particular individual. Prior to the issue of this order, Defendant-Respondent had made repeated applications ;

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Plaintiff, on the other hand, appears to have made no claim till the 1st of April, 1875, when he instituted this suit.

"The Court of first instance dismissed the claim as barred by limitation. In appeal counsel for Plaintiff, who has argued the case very forcibly, pleads :—

"1.—That limitation runs not from the death of the Mulka, but from the date when the property was released from confiscation, and came into Defendant's possession.

"2.—That the Plaintiff was not empowered to sue, either on the death of the Mulka or his father, a month subsequently, and that his omission to sue then does not bar him from suing in 1875, on the ground that the property was released jointly to the Defendant and other heirs.

"3.—That the term of adverse possession of Government from 1858 to 1863 should be excluded in reckoning the limitation.

"4.—That Defendant is a trustee in relation to her co-heirs in the estate of *Mulka Kishore*.

"Great stress was laid on Art. 145, Sched. II, Act IX, of 1871, and it was urged that twelve years adverse possession was necessary to bar claims, and that in this respect the new law of limitation and the old were in accord, it is admitted that a claim once barred under the old *Limitation Act* cannot be revived under the new.

"It appears to me, however, that in a claim by the heir of the deceased Mulka to a share in her property, limitation must be reckoned from the date of her death, or, at any rate, from the death of her son and Plaintiff's father, a month later, i.e., March, 1858.

"And on the second point there is nothing to shew that there was anything to prevent Plaintiff from asserting his claim by legal means to the property while Government was in possession. On the third plea, I am not aware of any law by which the term of possession by Government under the circumstances noted could be excluded in computing the period of limitation.

"And on the last point I think it is clear that Defendant-Respondent was in no sense a trustee; she has throughout claimed the whole property as her own, and the relinquishment by Government was not in her favour, as already noted.

"The revenue-paying lands were settled with third parties at the summary settlement, and at regular settlement the settlement was ordered to be made with the heirs of *Mulka Kishore*, and so far the case differs from that of the *Lucknow* property. But in respect of those lands also, though Plaintiff would have had a good cause of action in the Settlement Court his claim is barred by limitation now. For the above reasons I cannot interfere with the decision of the Lower Court, and must dismiss the appeal with costs against Appellant."

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Graham (G. Williamson with him), for the Appellant, contended that the Respondent obtained-possession of the property in suit, which had been left by the late Queen-Mother, on her own behalf and on behalf of the other heirs of the deceased Queen. She was trustee for the Appellant as respects his share therein. It was in derogation of the Appellant's rights and in violation of that trust that she appropriated the same to her own use and deprived the Appellant thereof. Even if the Respondent is not to be treated as a trustee, and if her possession is to be regarded as adverse to the Appellant, the period of limitation does not run from the date of the confiscation by Lord Canning's proclamation in 1858, but from the date of the regrant, which was within the statutable period. Reference was made to Art. 145, Sched. 2 of Act IX of 1871. There was no adverse possession until the Respondent took more land and houses than she was entitled to. The Appellant came forward as one of the heirs of the Queen-Mother within twelve years from the date of the settlement with the heirs of the Queen-Mother, and therefore, within twelve years of the time that his title accrued, as well as from the time that the possession of the Respondent became adverse.

Leith, Q.C. (C. W. Arathoon with him), for the Respondent, contended that the action was barred by limitation. The Respondent was in possession of the properties sought to be recovered from before the death of the Queen-Mother up to the date of the confiscation in 1858. At that date they were seized as the property of the Respondent, who had been in possession from the date of the Queen-Mother's deed of gift, viz., in 1856. The houses

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were released on the 6th of July, 1863, and the land in November, 1863. The plaint was filed on the 11th of March, 1875. As regards adverse possession, that began in 1856 and recommenced in 1863. There is no case in which a constructive trust has been declared in reference to these regrants of confiscated property. The cases all proceed upon the footing of express trusts. There is no implied trust on the part of those who come forward and obtain regrants on behalf of those who do not. The Appellant must shew that his title (if any) accrued within twelve years from date of action. The Appellant's case turns on the issue whether any regrant was ever made to him. He is not an heir to the Queen-Mother by Mahomedan law. He is a grandson, and cannot take by representation. If he has no title under the regrant, then with regard to all properties released from confiscation the Respondent can fall back on his old title and his former possession. [SIR JAMES W. COLVILE :—The case can hardly be tried on the point of limitation without trying the whole case, especially with reference to issues 7 and 8.]

THEIR LORDSHIPS suggested, and counsel on both sides agreed, that the case should be remanded, and that issues should be settled by *Leith and Graham*.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are of opinion that the decisions of both the lower Courts on the question of limitation must be reversed, and that this case must be remanded to be retried and determined in the lower Courts upon certain issues which will be directed by their Lordships.

The action is brought by Prince *Mirza Jehan Kudr Bahadur* against Nawab *Afsur Begum*. The property in respect of which the action is brought consists of two portions, the one of certain houses in the city of *Lucknow*, and the other of mouzah *Sahrawan* situate in the district of *Unao* in the province of *Oudh*. The Defendant obtained possession of both properties, and the Plaintiff brought his suit claiming two-thirds of the property. His claim is now reduced to two-thirds of two-fifths. He claimed two-thirds

of the property upon the following grounds : He said that the property originally belonged to Nawab *Malkar Kishwar*, who may be called, as she has been called in the argument, the Queen-Mother. He said, " After the mutiny the said estate was taken possession of by the British Government, and the Government retained its possession, pending an inquiry into the conduct of the owner and other matters connected with the State, till 1864. In 1864 the Government, after inquiry, ordered the property to be released in favour of the heirs of Nawab *Malkar Kishwar Sahibah*, and the Defendant obtained possession of the same on her own part and on the part of the other heirs of Nawab *Malkar Kishwar Sahibah*. Thus it was that on the 16th of November, 1863, the Settlement Court ordered the settlement of mouzah *Sahrawan* to be made with the heirs of Nawab *Malkar Kishwar Sahibah*, and in accordance with that order the Defendant got possession of the village on her own part and on the part of the other heirs of Nawab *Malkar Kishwar Sahibah*." With reference to that allegation the Defendant says, " In the settlement papers of mauzah *Sahrawan* the Defendant's name only has been recorded ; and this being a claim for an amendment of the settlement, cannot be entertained in this province." No issue appears to have been raised in the lower Courts with reference to that contention of the parties.

By Lord *Canning's* proclamation of the 15th March, 1858 (1), all the proprietary rights in the soil of the province were confiscated ; and by a proclamation of Sir *James Outram* it was notified that " for those who have fled from the city"—speaking of the city of *Lucknow*—" having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property, with their houses, will be confiscated."

Their Lordships think it unnecessary to determine what was the effect of Lord *Canning's* proclamation with reference to the houses, or what was the effect of Sir *James Outram's* proclamation of the 22nd of March, 1858, because, with reference to all the houses in *Lucknow*, which are the subject of the present suit, the Government gave up altogether there rights under the confiscation.

(1) See *ante*, p. 74.

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Paragraph 4 of the letter of the 6th of July, 1863, from the Secretary of the Chief Commissioner to the officiating Commissioner is as follows : " The Chief Commissioner understands from the Deputy Commissioner that the value of the property lies almost entirely in the buildings, which consist of shops, mosques, tombs, and mehal serais. The value of the land is so triflings in comparison that the principle of treating the buildings as having become by accretion part of the land, and having lapsed with the latter, as was ruled in the case of the *Khas Mohul's* claim to the *Alumbagh*, should not, in the Chief Commissioner's opinion, though incontestably sound, be enforced in this case. The property, as the Chief Commissioner learns from the Deputy Commissioner, yields a rent of no more than Rs. 2,000 a year, as few of the shops hold tenants. It is therefore of no great value to Government, nor is it likely to become of greater, whereas it may improve under private management. For these reasons the Chief Commissioner thinks the right of Government to the property should be abandoned, and possession relinquished, but not in favour of *Afsur Bahu*, or anyone else. Claimants must agree among themselves or apply to the Civil Court to decide their pretensions."

Their Lordships, taking this letter into consideration, are of opinion that it was the intention of the Government to abandon altogether the confiscation as regards the houses and property in the city of *Lucknow*, and to leave the former owners to their rights in the same way as if there had never been any confiscation. If the Defendant in the suit had been in possession, as she alleges, of the houses and other property in the city of *Lucknow* before the proclamation, the question of limitation might arise as against the Plaintiff with regard to these houses and other property. But this question has not been tried in the cause, and upon the evidence before them their Lordships have not the means of determining it. All they can do is to express their opinion with regard to these houses and other property, that if the Defendant was in possession before the proclamation, the question must be determined in the same manner as if there had never been any confiscation at all.

With regard to the mouzah, it appears to their Lordships to be clear that the question of limitation does not arise. Their Lord-

ships are of opinion that the effect of Lord *Canning's* proclamation of 1858 was to put an end to all previous titles. Whatever title, then, either party has to the mouzah must have been acquired by some grant or some proceeding of the Government subsequent to that proclamation, and any grant or proceeding under which he can have acquired a title must have been within the period of twelve years prior to the commencement of the suit. Therefore, with regard to the mouzah, the question of limitation will not apply, but the question of title must be determined, and the Defendant being in possession, the Plaintiff must recover on his own title.

From a minute of the Chief Commissioner, dated the 25th of October, 1863, it appears that in a suit between *Bhyroon Singh* and others, and the present Defendant *Afsur Bahu Begum*, *Bhyroon Singh*, and others claimed that, having mortgaged the mouzah to the Queen-Mother, they were entitled to have the revenue settlement made with them. The Settlement Commissioner decided that the settlement ought not (for certain reasons which were given) to be made with the then Plaintiffs, but that it ought to be made with *Afsur Bahu*, the present Defendant. Upon an appeal which came before the Chief Commissioner, he says: "I agree with the Commissioner in holding that the mortgagee was really the Queen-Mother, though the deed was drawn up in the name of *Agha Ahmed*, and the zemindars in their appeal plainly indicate her as the party who acquired possession of the village by the mortgage. But in the meantime the Commissioner's orders must be so far modified as to make his decree run in the name of the heirs of *Mulkar Kishwar*, and not of her daughter *Afsur Bahu* alone; for it has been shewn in another case that there is no proof of the alleged gift by the deceased Queen of all her property. *Afsur Bahu* and her other children can claim to share in it".

It has been contended that the words "the heirs of *Mulkar Kishwar*" did not include the present Plaintiff, inasmuch as he was not an heir of his grandmother. But it may be a question whether by the words the "heirs of *Mulkar Kishwar*" the Chief Commissioner did not intend to include the Plaintiff to the extent of the share which but for the confiscation he would have inherited from his father, the General *Sahib*, who was one of the heirs of the

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Queen-Mother, and was living at the time of her death. That is a question which will have to be considered in determining whether the Plaintiff, by reason of the Chief Commissioner's decree, was not entitled to two-thirds of the share of his father, that being the only portion which he now claims.

The question, however, does not depend merely upon the order of the Chief Commissioner, which does not appear to have been ever carried into effect. It was not a decision between the present Plaintiff and *Afsur Bahu*, the present Defendant, but it was in a proceeding between certain Hindu gentlemen, who are not now parties, and the present Defendant. The Chief Commissioner said that the decision of the Commissioner ought to be that the settlement should be made, with the heirs of the Queen-Mother. We have not got the proceedings which took place subsequently to the order of the Chief Commissioner. The order was sent by the secretary to the Chief Commissioner to the Settlement Department, and the document was filed in that department. The settlement, however, does not appear to have been made in accordance with the direction of the Chief Commissioner. As far as can be ascertained from the record, it seems to have been made with the present Defendant alone, for there is a proceeding in which a person, evidently the agent of the Plaintiff, says, "At the regular settlement"—that is the proceeding in 1864 after the date of the Chief Commissioner's ruling—"the village has been assessed at Rs. 2,973, which I, the agent, will, under the terms entered in my application, continue to pay by instalments detailed below for thirty years from Rabi 1271 F. to Kharif 1301 Fasli (corresponding with 1894), and thereafter, pending the wishes of the Government." So that then he offers, as the agent of the present Defendant, to take the settlement of this mouzah for thirty years at the revenue of Rs. 2,973. We have not the kubulyut which was entered into at the time when the regular settlement was effected. Possibly it was a kubulyut executed by the agent on behalf of his client, the present Defendant; and it appears, as far as one can judge from a document which is set out in the record,—though that document has not any date attached to it,—that the settlement was actually made with the present Defendant alone, and that she was recorded as the person who had taken the settlement from the

Government. The document is No. 4. Under the head "name of lambardar" is the name of the present Defendant. Then the property is mentioned, and in the column headed "names of sharers" the Defendant is mentioned as the only person, "Nawab Afsur Bahu Begum Sahibah, daughter of the King Amjad Ali Shah," and then the amount of the revenue assessment is Rs. 2,973; that is the revenue which was stated in the offer made by the agent. Without seeing these documents it is impossible to say whether the Plaintiff did or did not acquire a title to this property, or to a share in it, from the Government after the confiscation; and it appears to their Lordships that the case must be remanded in order that the question may be tried whether the Plaintiff, after the confiscation, acquired a title to any share in this mouzah. One issue should be raised, whether, after the Chief Commissioner's order that a settlement was to be made with the heirs, a settlement was made with the heirs, or whether it was made with any other and what person, and under what circumstances, and what was the effect of the settlement. It also appears to their Lordships that if any kubulyut was executed, that kubulyut ought to be called for and examined by the Court, in order that it may be ascertained whether the Defendant took the settlement on her own behalf adversely to the other heirs or whether she took it as a trustee for herself and the other heirs.

Upon the whole their Lordships are of opinion that, as regards the mouzah, there is no question of limitation, but only a question of title which must be tried. With regard to the houses, the question of limitation may arise in the manner which their Lordships have already indicated.

Several issues were raised in the Lower Court which now appear to be irrelevant, and their Lordships think that the cause ought not to go down upon those irrelevant issues: on the other hand, there are fresh issues which ought to be settled and tried; and their Lordships are of opinion that the proper course will be that the learned counsel for both parties should submit to their Lordships any issues which they think ought to be tried in the Court below. Their Lordships will then finally settle the issues upon which the record is to be remanded.

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On the 14th December, 1878.

AT THE COUNCIL CHAMBER.

As to the mouzah.

Minutes having been prepared by council, in obedience to the foregoing directions of their Lordships, their Lordships considered and approved the same, and agreed thereupon humbly to advise Her Majesty that the decisions of the Civil Judge of *Lucknow* and of the Commissioner of the *Lucknow* Division, bearing date respectively the 16th of August, 1875, and the 22nd of January, 1876, be reversed, and that the case be remanded to the Court of the Commissioner of the *Lucknow* Division to direct the cause to be tried and determined by the Civil Judge of *Lucknow* upon the following issues, viz.:—

1st. Whether the Plaintiff, after the confiscation of the mouzah *Sahrawan* under Lord *Canning's* proclamation, acquired by any and what means any and what right or title to any and what share of and in the said mouzah ?

2nd. Whether, after the Chief Commissioner's order of the 25th of October, 1863, directing that a settlement should be made in the names of the heirs of *Malkar Kishwar* (the Queen-Mother), the settlement was so made ; or whether a settlement was made with the Defendant, or with any other and what person or persons, and under what circumstances, and what was the effect thereof?

3rd. Whether, at the time of such settlement, and if any, what kubulyut was executed by any and what person or persons ?

4th. Whether the Plaintiff was, according to Mahomedan law, one of the heirs of the said *Malkar Kishwar* ; or whether the Commissioner intended by the word "heirs" to include the Plaintiff to the share, or any portion of the share, which his father would have been entitled to if he had been then alive?

As to the Houses and other property in the city of Lucknow.

1st. Whether, considering that the confiscation of some of the above houses and property was abandoned by the Government, leaving all the former owners to their rights by law, the Plaintiff

was entitled to any and what share thereof at the time when he brought his suit ?

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2nd. Whether the Defendant was in possession of the said houses and property, or of any and what portion thereof, and, if so, under what circumstances, before the proclamation of Lord *Canning*, and, if so, whether the suit of the Plaintiff in respect thereof was barred by the *Act of Limitation*.

As to all the property in suit.

3rd. Whether the late *Malkar Kishwar* (the Queen-Mother) did in her lifetime make some and what gift in respect of the said properties, or any and what portion thereof, in favour of the Defendant, and, if so, whether the same was valid in law?

The costs of this appeal on both sides will be taxed here, and the respective amounts will be costs in the cause, and abide the event of the final decision of the lower Court.

Solicitors for appellant : *Watkins & Lattey*.

Solicitor for respondent : *T. L. Wilson*.

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DIAN OF THE INFANT SONS) }

AND

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SHEO FROSHAD SINGH AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mitakshara Law—Mortgage of Ancestral Estate by the Father—Purchasers at Execution Sale, with notice of Co-sharers' Claims—Effect of Execution Sale on the Share of deceased Judgment-debtor.

An *ex parte* decree for money having been obtained against a Hindu governed by the Mitakshara, upon a bond whereby he had mortgaged his ancestral immovable estate, the same was attached. Prior to the execution sale the judgment-debtor died, and his infant sons and co-heirs, on filing a petition of objections, had been referred to a regular suit.

In a suit after the sale by the said infants against the execution creditor and the purchasers, for the adjudication of their right to and confirmation of possession in the property sold, and to have the mortgage bond, the *ex parte* decree, and the execution sale set aside, it appeared that the father's debt had been incurred without justifying necessity :—

Held, that as between the infants and the execution creditor, neither they nor the ancestral immovable property in their hands was liable for the father's debt :

Held, as regards the purchasers, that they having purchased after objections filed by the Plaintiffs, must be taken to have had notice, actual or constructive, thereof, and therefore to have purchased with knowledge of the Plaintiffs' claim and subject to the result of the suit to which they had been referred :

Held, as regards the judgment-debtor's undivided share in the estate sold, that whether or not his own alienation was valid by the law as understood in *Bengal*, it was capable of being seized in execution, and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale.

APPEAL from a decree of the High Court (July 21, 1875), which reversed a decree of the Subordinate Judge of *Tirhoot* (April 27, 1874).

*Present :—SIR JAMES W. COVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The Respondents were purchasers at a sale in execution of a decree upon a mortgage bond, obtained by *Bolaki Chowdhry* against *Adit Sahai*, the deceased husband of the Appellant and father of the infants, of a share of an ancestral village standing in his (*Adit Sahai's*) name, and the main question decided in this appeal was whether, under the circumstances stated in their Lordships' judgment, as appearing in the suit, any and what interest passed to the purchasers. The appellant claimed that inasmuch as the property sold was the joint family estate of *Adit Sahai* and his sons, the latter did not, under the Mitakshara law and the circumstances of the case, take the same as survivors and without liability to the decree.

The suit was instituted on the 27th of August, 1873, and the substantial allegations in the plaint were, that *Bissumbhurpore* (the village above referred to) was ancestral property, in which *Adit Sahai's* minor sons were jointly interested with him in his lifetime, and that their estate could not be sold for his personal debts, contracted under no legal necessity, and for mere purposes of extravagance, and that the purchasers bought, with full knowledge of the objection, for small prices. And the prayar was, that the order to give possession to the purchasers, as against the Plaintiff, should be restrained, and the possession of the latter confirmed.

The purchasers and *Bolaki Chowdhry* put in separate written statements.

They contended that *Adit Sahai* was a very careful person, but much hampered by ancestral debts and necessary family expenses, to meet which his income was insufficient, and that he borrowed from *Bolaki Chowdhry* to meet those debts and expenses, as he was justified in doing by Hindu law.

The purchaser Defendants also contended that one of the minors had not been born when the mortgage to *Bolaki Chowdhry* was executed, and the other, the elder, had not been born when the debts had been incurred by *Adit Sahai*, to discharge which that mortgage was executed.

The judgment of the subordinate Judge, after condemning *Bolaki* for lending so large a sum without inquiry as to the necessity, and holding the debt legally invalid so far as the survi-

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vers were concerned, proceeded as follows, with regard to the Respondents :—

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"A few words will do to dispose of the case of the auction-purchaser Defendants. They say that they are innocent purchasers for a valuable consideration, and as such they ought not to suffer ; but I hold that they are not innocent purchasers in the proper sense of the term, for notice was given before the sale by the Plaintiff that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family. Notwithstanding this notice, they purchased the property, of course with their eyes wide open. When the record contained such a protest, it was the province of the intending purchasers to inquire whether or not the decree, in execution of which the property was to be sold, was a valid decree against the family ancestral property. When they came forward to purchase, it was to be presumed that they knew the nature of the decree and circumstances surrounding the sale of the property attached. There was no pressure on the family property when *Bolaki's* loan was contracted, no recital in his bond as to necessity. Even recital *per se* is not sufficient. They knew that a son, under the Mitakshara law, is a joint owner with his father in ancestral property, and that without his consent no alienation could be legal. Even if they did not know it, still they had a notice of it before the sale took place. Therefore they are to blame themselves if they suffer for their want of due diligence in instituting inquiry as to the existence of a necessity justifying the debt, in satisfaction of which the proposed sale was to take place (see the following rulings : 12 Suth. W. R. p. 446 ; 14 Suth. W. R. p. 72 ; 8 Suth. W. R. p. 365). As the debt, in satisfaction of which the sale took place did not benefit the estate which was the minor's ancestral immoveable property, the purchasers have no right to a refund of the purchase-money. Therefore the sale should be cancelled unconditionally and unreservedly, and the relief asked for granted."

The Subordinate Judge accordingly decreed in favour of the Appellant, and confirmed her possession by setting aside the mortgage bond, the decree thereon, and the sale held in execution thereof.

The High Court (*Glover and Romeschunder Mitter, JJ.*) reversed this judgment, and dismissed the Appellant's suit with costs. They held as follows :—

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" The Subordinate Judge has decided (in the words of the well-known case of *Hunooman Pershad* (1), that although the creditor would have been justified in advancing his money if he had made such inquiry as was open to him, and had satisfied himself, as well as he could, as to the existence of the necessity, he did not in this case make such inquiry ; or rather, perhaps, his words may be taken to mean, that the result of any inquiry must have shewn him quite clearly, that the only necessity of *Adit Sahai* was his own improper and immoral way of life, which craved the expenditure of funds not derivable from his regular income. And this decision would, I think, have been perfectly fair and right, were we dealing with *Bolaki Chowdry* only ; for he appears to have acted as the family mahajun for a long time previous, and must necessarily have been acquainted with *Adit's* circumstances and way of life ; but it is a different thing when we have to deal with third parties, strangers, who have purchased at public auction for valuable consideration, and who bought on the faith that the decree under which the sale was made was a proper decree, and properly obtained. The rule in such a case has been laid down by the Privy Council in *Muddun Thakoor v. Kantoo Lall* (2), and their Lordships say :— ' A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution was not bound to go further back than to see if there was a decree against the fathers, that the property was property liable to satisfy the decree if the decree had been given properly against them, and having inquired into that, and having *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consi-

(1) 6 Moore Ind. Ap. Ca. 421.

(2) Law. Rep. 1 Ind. Ap. 321 ; 14 Beng. L. R. 187 ; 22 Suth. W. R. 56.

J. C. deration for the property, the Plaintiffs are not entitled to come in
 1878-9 and set aside all that has been done under the decree and execu-
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" It seems to me that these words are quite sufficient to cover the Defendant purchasers' acts ; for it is not denied that they purchased the estate and paid valuable consideration for it *bona fide* ; but it is argued that the words ' if the decree was a proper one' alter their position, inasmuch as they had been duly warned by the Plaintiff that the moneys had been lent for improper purposes, and that the decree obtained by *Bolaki* was therefore an improper one.

" But if this be so, the onus was clearly on the Plaintiff of shewing that the decree, which had been duly and legally obtained from a competent Court, was an improper one, and I do not understand *Baboo Unoda Pershad*, who appears for the Plaintiff, to contend that the evidence on the record is sufficient to prove the fact. There is some evidence, no doubt, but it is of a very vague and uncertain character. There are plenty of witnesses who depose to the fact that *Adit Sahai* was a young man of dissipated habits, was fond of drinking and *natches*, and spent a great deal of money ; but none of them are able to give any particulars of the debt for which the decree was given, or to shew that the money advanced was to clear off debts of a disreputable character, so as to make the decree of the lender, who knowingly made such advances, an improper one.

" I think, therefore, that the purchaser Defendants, who are the parties appealing to this Court, are entitled to retain their bargains, on the ground that they bought and paid for the property *bona fide*, without anything beyond mere assertion on the part of the debtor's family that the decree had been improperly obtained, and would not make any foundation of title.

Cowie, Q.C. and Doyne, for the Appellant :—

First, the father, the judgment debtor, having died before the date of the sale, his right, title, and interest in the property seized had passed by survivorship to his sons, who during his life had been entitled to hold and enjoy the same jointly with their father, and after his death to take the whole by right of survivorship

according to the Mitakshara. Consequently nothing passed by the sale to the purchasers, for at the time of the sale the right, title, and interest which the judgment debtor had in his lifetime had passed by his death to his sons. In the two cases of *Girdharee Lall v. Kantoo Lall* and *Muddun Thakoor v. Kanto Lall* (1), the fathers were living at the time of the sale, and therefore it is fallacious to compare them with this case. In the second of the two cases there was a decree against the two fathers, which by Hindu law would have bound the reversioners on the ground of the debt having been incurred by necessity. The expressions in that case go further than in any case before or since. Reference was then made to *Mussumat Phoolbas Koonwur v. Lalla Jogeshur Sahoy* (2) and to *Deendyal v. Jugdeep Narain Singh* (3), where again the sale was during the lifetime of the judgment debtor. In this case the minors represented by the Appellant were proceeded against as the representatives of their father, in execution of a decree against the father for a personal debt of his own. In *Muddun Thakoor's Case* there was a real saleable interest existing at the time of the sale which could and did pass to the purchaser; and in *Deendyal's case* the sale might have been good subject to objections under Mitakshara law to the transaction out of which it arose. Secondly, while the father lived he had no undivided share which he could alienate at will, but only a right to partition; and a stranger purchasing his share during his lifetime obtained no greater right. Here that right had ceased to exist before the sale, and the price given shews that the purchaser knew that it was a speculative transaction.

Leith, Q.C., and Graham, for the Respondents, the purchasers:—

The evidence shewed that all legal conditions existed necessary to support *Adit Sahai's* mortgage of his share of *Bissumbhurpore* to *Bolaki Chowdhry*. A judicial sale having been held of the mortgaged property so aliened under circumstances of necessity bound the interests of the sons as well as the father and passed the entire estate. Under the Mitakshara law the sons have only

(1) Law Rep. 1 Ind. Ap. 321, 333; (2) Law Rep. 3 Ind. Ap. 7
S. C. 14 Beng. L. R. 187. (3) Law Rep. 4 Ind. Ap. 247.

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J. C. an inchoate interest in the ancestral property, which is not completed till the father's death. The sons cannot sue for a partition till the father's death : see *Mitak. c. i. s. 1, v. 21.* [SIR BARNES PEACOCK referred to vv. 27, 28 and 29 to shew that the father may alienate without the consent of the sons.] Under the *Mitakshara* as well as the *Dayabhaga* the sons represent the father, and are bound by a decree validly passed against him. *Phoolbas Koonwur v. Lalla Jogeshur Sahoy* (1) does not affect this case. Under the *Mitakshara* (see c. i. s. 3), partition takes place after payment of debts, which shews that the heirs are under the same obligation with regard to debts under the *Mitakshara* as under the *Dayabhaga*. The only exception is in case of immoral debts ; those contracted through extravagance form no exception. [SIR BARNES PEACOCK referred to *Vyavatha Darpana*, p. 343, as to immoral debts]. *Muddun Thakoors Case* (2) is exactly identical with this. See also *Musst. Junnuk Kishoree Koonwar v. Rughoonundun Sing* (3) [SIR MONTAGUE E. SMITH referred to *Soorrendra Pershad Dobey v. Nundun Misser* (4).] The purchase here was under a decree without notice actual or constructive that the sons had adverse claims. The remedy was for the Appellant to have obtained an injunction to stay the sale on the ground that the father had no right to mortgage the property.

Even if the rights of the sons had been established as claimed, the Respondents are nevertheless entitled to a declaration that they as purchasers under the judicial sale acquired the share and interest of *Adit Sahai* himself. If the sale were altogether inoperative the Respondents were at least entitled to a refund of the purchase-money from *Bolaki Chowdhry*.

Cowie, Q.C., replied, and referred to *Rajah Ram Tewarry v. Luchman Pershad* (5) and *Laljeet Singh v. Rajcoomar Singh* (6).

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE—

The question to be determined on this appeal is, what are the

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(1) Law. Rep. 3 Ind. Ap. 7.

(4) 21 Sudh. W. R. 196.

(2) Law. Rep. 1 Ind. Ap. p. 332

(5) 8 Sudh. W. R. 15.

(3) S. D. A. (1861), p. 221

(6) 12 Beng. L. R. 373.

respective rights of the infant Plaintiffs and Appellants on the one hand, and of the Respondents claiming as purchasers at an execution sale on the other, in an eight anna share of mouzah *Bissum-bhurpore*, a village situate in the district of *Tirhoot*. The material facts out of which this question arises are the following :—

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Baboo Adit Sahai, the father of the Plaintiff, became on the death of his father *Nursing Sahai* in 1862, or by virtue of a subsequent partition effected with a coparcener, the sole owner of certain ancestral immovable property in *Tirhoot*, including eight annas of mouzah *Bissumbhurpore*. It has been assumed throughout the proceedings that the case was governed by the law of the *Mitakshara*; that, or the *Mithila* law, which is the same in respect of the questions raised in the suit, being the general law of the district. He had afterwards two sons, who are the infant Plaintiffs. Of these, *Ram Sahai* was born in 1862, and *Bhuggobutti* in October, 1869. These dates were disputed, but have, in their Lordships' opinion, been conclusively established in the suit. On the 21st of January, 1870, *Adit Sahai* executed, in favour of one *Bolaki Chowdry*, a Defendant in the suit, though not a Respondent on this appeal, an instrument in the form of a bond and Bengali mortgage, whereby he bound himself to repay the sum of Rs.13,000, which he had borrowed from *Bolaki*, with interest at the rate of 15 per cent. per annum, and pledged as security for such repayment the whole and entire proprietary shares owned and possessed by him in mouzah *Surakdeeha* (also part of the ancestral estate) and mouzah *Bissumbhurpore*. This bond does not expressly state any reason for incurring the debt, but it refers to a negotiation for a loan of a smaller sum from another party, which had fallen through, and says that that sum was not then sufficient to meet the payments of the obligor's several creditors. It was registered on the 21st of January, 1870.

On the 30th of December, 1872, *Bolaki Chowdry*, suing on this instrument, obtained an *ex parte* decree against *Adit Sahai* alone for the sum of Rs.16,901. 13a. 3p., the amount due for principal, interest and costs. The terms of this decree were in the usual terms of a decree in such a suit, viz., that the sum decreed should be realized by the sale of the mortgaged property, and that if the said property should not be found sufficient to meet the payment

J. C. of it, the person and other properties of the judgment debtor
1879 should be held liable for it.

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On the 21st of March, 1873, *Adit Sahai* presented a petition to the Court. This, after stating that execution having been issued in the usual way, the mortgaged property had been ordered to be put up for sale ; that on production of Rs.3000 out of the decretal amount the Court had granted time for one month, and postponed the sale to the 7th of April ; that the Petitioner was very ill, and would be ruined by a forced sale, prayed the Court to grant a further postponement of the sale, and, under the provisions of the 243rd section of the Act VIII. of 1869, to appoint a surbarakur of the mouzahs in question, and certain other portions of the ancestral estate. From the order made on this petition it appears that the attachment of *Bissumbhurpore* had for some reason been already quashed, and that a new attachment was about to be made ; and it was accordingly directed that in the meantime the petition should stand over. That second attachment must have been made, for subsequent proceedings in execution were had, in the course of which *Binda Koer*, the mother of *Adit Sahai*, claimed to be entitled in her own right to one anna of mouzah *Bissumbhurpore*, and to some part of the other property taken in execution. Her latter claim was allowed, but that affecting *Bissumbhurpore* was rejected ; and the execution sale stood fixed for the 23rd of May, 1873, when, on the 19th of that month *Adit Sahai* died. The proceedings against *Adit Sahai* were thereupon revived in the usual way against his two sons as his heirs, and the 28th of July, 1873, was fixed as the day of the sale of the property liable to the execution. On the 14th of that month, however, *Mussumat Sooraj Bansi Koer*, as the mother and guardian of the infant Appellants, filed a petition of objections for the protection of their interests as the sons of, and, therefore, under the Mitakshara law, the co-sharers with, their father in his lifetime in the property ; and the order passed on that petition was in effect that the objections could not be heard and decided in the execution department, but that if the Petitioners had any interest in the property attached apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The execution accordingly proceeded, the sale took

place on the 28th of July, and the lot described as "the eight anna share of the Judgment debtor in mouzah *Bissumbhurpore*, part of the mortgaged property as per inventory of the decree-holder" was purchased by the Respondents for Rs.6600. The sale proceeding was ordered to be duly kept with the record. Whether the usual certificate was afterwards issued to the purchasers, or in what terms, if issued, it was expressed, does not clearly appear on the record ; but it is certain that they had not been put into possession on the 27th of August, 1873, when the present suit was commenced.

That is a suit by the infant Appellants, suing, by their mother and guardian, against the Respondents as the purchasers of the eight annas of *Bissumbhurpore* at the execution sale, and also against *Bolaki Chowdry*, the execution creditor. The plaint prayed for the adjudication of the right of the Plaintiffs to, and the confirmation of their possession in the eight annas of *Bissumbhurpore*; to have the mortgage bond of the 21st of January, 1870, the *ex parte* judgment obtained by the Defendant *Bolaki* thereon, the miscellaneous orders rejecting the Plaintiff's objections, and the auction sale of the 28th of July, 1873, set aside ; and for an injunction to restrain the delivery of possession of the disputed property to the Respondents. The claim to this relief was founded on the rights which, under the law of the Mitakshara, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber, or waste that property ; and the plaint contained the charges, usual in such cases, of immoral and extravagant conduct on the part of *Adit Sahai*.

The subordinate Judge, by his judgment of the 27th of April, 1874, found for the Plaintiffs on all the issues in the suit, and gave them a decree for the confirmation of their possession, and the cancellation of the bond of the 21st of January, the decree founded thereon, and the execution sale.

He found in particular that there was no justifying necessity for the loan of the Rs.13,000, or for the former loans in repayment of which part of that money was employed ; that the balance of the money was not shewn to have been applied to family purposes ; that *Bolaki* had failed in his duty to make *bona fide* inquiry into

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the necessity, but had lent without such inquiry the money to a man whom he well knew to be over head and ears in debt, and living a life of debauchery and sensuality ; that consequently the *ex parte* decree was void of all legal force against the family estate of which the debtor was but a joint owner ; and that for the same reason the execution sale effected thereunder could not stand so far as the family property was concerned. He also held that the rights of the purchasers stood on no better ground than those of the execution creditor ; that they were "not innocent purchasers in the proper sense of the term, since notice was given before the sale by the Plaintiffs that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family."

On appeal to a Division Bench of the High Court the learned Judges, in their judgment of the 21st of July, 1875, said :—

"The Subordinate Judge has decided (in the words of the well-known case of *Hunooman Pershad* (1) that although the creditor would have been justified in advancing his money if he had made such inquiry as was open to him, and satisfied himself, as well as he could, as to the existence of the necessity, he did not in this case make such inquiry ; or rather, perhaps, his words may be taken to mean that the result of any inquiry must have shewn him quite clearly that the only necessity of *Adit Sahai* was his own improper and immoral way of life, which required the expenditure of funds not derivable from his regular income. And this decision would, we think, have been perfectly fair and right, were we dealing with *Bolaki Chowdry* only ; for he appears to have acted as the family mahajun for a long time previous, and must necessarily have been acquainted with *Adit's* circumstances and way of life."

The learned Judges, however, proceeded to rule that the purchasers (the Respondents) stood on higher ground ; that under the authority of the case of *Muddun Thakoor v. Kantoo Lall* (2) they were to be treated as strangers who had purchased at public auction for valuable consideration, and had bought on the faith that the decree under which the sale was made was a proper decree, and properly obtained. In a subsequent part of their

judgment they threw out that the onus of shewing against the purchasers that the decree was an improper one lay upon the Plaintiff ; and that the evidence in the cause as to the habits and immoral conduct of *Adit Sahai*, though strong enough to support a decree against *Bolaki Chowdry*, might not be strong enough to support one against the purchasers. The formal decree passed was that the decree of the Lower Court should be reversed, and the suit as against the purchasers, Defendants, dismissed.

The result, then, of the judgment and decree under appeal is that the Plaintiffs had established, as against the execution creditor, a case which, had he been the purchaser at the execution sale, would have entitled them to full relief against him ; but that they had not established a title to any relief against the purchasers, the Respondents.

The extreme contention on the part of the appellants is, that nothing passed or could pass to the Respondents under the execution sale, because, on the death of the judgment debtor before the sale, the whole of his interest vested by survivorship in his sons, leaving nothing upon which the execution could operate.

The extreme contention on the part of the Respondents is, that the sale took effect on the whole of the mortgaged property, and passed the interest of the sons, as well as that of the father therein.

An intermediate proposition is, that the sale was operative upon the right, title, and interest of the judgment debtor in the property put up for sale, so as to pass the share to which, upon a partition effected in his lifetime, he would have been entitled in eight annas of mouzah *Bissumbhupore*.

The arguments addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the Hindu law which are the foundation of the Plaintiff's claim, and what the rights which flow from them. These questions are of course determinable by the texts of the *Mitakshara*, as interpreted by judicial decisions either of the Courts of *India* or of this Board ; and it cannot be said that the course of decision has been altogether uniform and consistent.

That under the law of the *Mitakshara* each son upon his birth

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takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the *Mitakshara* are to be found in the 27th and following slokas of the first section of the first chapter. It was argued at the bar that, because in the third sloka of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and that "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary which are to be found in the *Mitakshara* itself (see slokas 5, 7, 8, 11 of the 5th section of the 1st chapter). But it seems to be now settled law in the Courts of the three presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh v. Rajcoomar Singh* (1) and *Raja Ram Tewarry v. Luchman Persad* (2), decided by the High Court of *Calcutta*; that of *Kaliparshad v. Ram-Charan* (3), decided by the High Court of the North-West Provinces; that of *Nagalinga Mudali v. Subbiramaniya Mudali and Others* (4), decided by the High Court of *Madras*; and the case of *Moro Vishvanath and Others v. Garnesh Vithal and Others* (5), decided by the High Court of *Bombay*. The decisions do not seem to go beyond *ancestral* immoveable property.

Hence, the rights of the coparceners in an undivided Hindu family governed by the law of the *Mitakshara*, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their

(1) 12 Beng. L. R. 373.

(3) Ind. L. R. 1 Allahabad, 159.

(2) Bengal Full Bench Rulings from 1863 to 1867, p. 731.

(4) 1 Madras, H. C. R. 77.

(5) 10 Bomb, H. C. R. 444.

father's debts which the Hindu law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of *India*, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied, at least in the case of minors, if it can be shewn that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required ; but this is a question which does not arise in the present case.

To what extent an unauthorized alienation can be impeached by coparceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of *India* upon it.

A distinction has been often made, both by Courts of Justice and by text writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasvami Gramini v. Ayyasvami Gramini* (1) of *Peddamuthulaty and Others v. N. Timma Reddy* (2), *Palanivelappa Kaundan v. Mannaru Naikan and Another* (3), and *J. Rayacharlu v. J.V. Venkataramaniah* (4), it has been settled law in the presidency of *Madras* that one coparcener may dispose of ancestral undivided estate, even by contract and conveyance, to the extent of his own share ; and a

(1) 1 *Madras, H. C. R.* 471.

(2) 2 *Madras, H. C. R.* 270.

(3) 2 *Madras, H. C. R.* 416.

(4) 4 *Madras, H. C. R.* 60.

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J. C. *fortiori* that such share may be seized and sold in execution for his separate debt.
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That the same law now obtains in the presidency of *Bombay* is shewn by the cases of *Damodhar Vithal Khare v. Dhamodar Hari Soman* (1), *Pandurang Anandram v. Bhaskar Shadashiv* (2), and *Udaram Sitaram v. Ranu Panduji and Another* (3). But it appears from the case of *Vrandavandas Ramdas v. Yamunabai* (4), and the cases there cited, that, in order to support the alienation by one coparcener of his share in undivided property, the alienation must be for value. The *Madras* Courts, on the other hand, seem to have gone so far as to recognise an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family ; and the law as established in *Madras* and *Bombay* has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition : see 1 *Strange*, Hindu Law [1st Ed.] p. 179, and App. vol. ii. pp. 277 and 282.

In *Bengal*, however, the law which prevails in the other presidencies as regards alienation by private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu v. Foolbashi Koer* (5), the law was carefully reviewed, and the Court, refusing to follow the *Madras* and *Bombay* decisions, held that, according to the Mitakshara law as received in the presidency of *Fort William*, one coparcener had not authority without the consent of his co-sharers to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case the Chief Justice intimated a doubt upon a question which did not then call for decision, viz., whether, under a decree against one coparcener in his lifetime, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal v. Jugdeep Narain*

(1) 1 Bomb. H. C. R. 182.

(4) 12 Bomb. H. C. R. 229.

(2) 11 Bomb. H. C. R. 72.

(5) 3 Beng. L. R. Full Bench

(3) 11 Bomb. H. C. R. 76.

Rulings, p. 31.

Singh (1), by which the law has so far been assimilated to that prevailing in *Madras* and *Bombay*, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition.

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But then the question arises, what is the consequence of the debtor dying before the execution is complete ; whether in that event the coparceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it.

This was much considered in the case of *Udaram Sitaram v. Ranee Panduji and another*, already cited from the 11 *Bombay* H. C. Report, p. 76. There the debt was the separate debt of a son joint in estate with his father. The suit was brought, after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was ruled that this could not be done ; that, though a son might be liable to pay his father's separate debts, there was no corresponding obligation on a father to pay his son's debts ; that the right of a son to a share in the joint ancestral property had died with him ; and that his share, having survived to the father, was no longer a subject upon which the execution could operate. This case is the more important, because the Court, whilst coming to the above conclusion, fully recognised the alienability of the share of one coparcener, as established at *Bombay* ; and shewed, with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's lifetime.

Mr. Mayne, in his valuable Treatise on Hindu Law and Usage, section 288, states that there had recently been a decision to the same effect as that just stated at *Madras*. Indeed, this was stronger than that at *Bombay* because the debtor had died after decree, though before execution. The case is cited as that of

(1) Law Rep. 4. Ind. Ap. 247.

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Kooppookonan v. Chinnayen (1), but their Lordships have been unable to obtain access to a copy of those reports, and can refer only to the abstract of the case in Mr. Mayne's work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a coparcener, as recognised at *Madras* and *Bombay*, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the *Bombay* Case (2) Chief Justice *Westropp* cites a decision of the High Court of the North-Western Provinces, *Goor Pershad v. Sheodeen* (3), which is still stronger than the last-mentioned case at *Madras*, because there the property had been actually attached in the debtor's lifetime.

It may be further observed that the Chief Justice in the case already cited from 3 *Bengal* Reports (4), seems to have intimated an opinion in favour of the general rule that an undivided share in joint property cannot be followed in the hands of coparceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

Their Lordships have hitherto dealt with the powers and rights of ordinary coparceners. They have now to consider how far those rights and powers are qualified by the obligation which the Hindu law lays upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice *Westropp* (5) :—

“ Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather.”

And as authorities for this proposition he cites *Colebrookes' Digest*, Book I., chap. v., par. 167, and *Girdhari Lall v. Kantoo Lall* (6). One of the earlier authorities cited at the bar upon this point was a case decided by the late Sudder Court of *Lower Bengal* in 1861, which is reported at p. 213 of the *Decisions of the Sudder*

(1) 1 Madras Reporter, 63.

(2) 11 Bomb. H. C. R. p. 85.

(3) 4 N. W. Prov. Rep. 137.

(4) See p. 36 *et seq.*

(5) 11 Bomb. H. C. R. p. 83.

(6) Law Rep. 1 Ind. Ap. 321.

Dewanny Adawlut of *Bengal* for that year. In it an infant son sued by his guardian, in the lifetime of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the Mithila law, and the first point decided was that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the Mitakshara.

This case recognised the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sales by conveyance because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are, "Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the Plaintiff has been unable to shew that the expenses for which these decrees were passed were, looking to the decrees themselves, and we cannot now look beyond them, immoral, and such as, under Hindu law, the son would not be liable for."

The decision of this tribunal in the before-mentioned case of *Kantoo Lall* has, however, gone beyond this decision of the Sudder Dewanny Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover

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property sold in execution of decrees of Court. The judgment, moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle laid down in the judgment of the Suddur Dewanny Adawlut, that a purchaser under an execution is not bound to go further back than to see that there was a decree against the father ; and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions :

1st, That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted ; and 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be extracted from the authorities which have been considered in the case before them.

It has been found by both the Indian Courts, and, in their Lordships' opinion, properly found, that the Plaintiffs, as between them and *Bolaki Chowdhry*, the judgment cireditor of *Adit Sahai*, had established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to *Bolaki* which had been contracted by their father. The two material issues on this point were, 1st, Whether the bond to *Bolaki* executed by the late father of the minors, was legally valid so far as the minors' interest

is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence : and, 2ndly, What sort of a life did *Adit Sahai* live : did he spend the money borrowed from *Bolaki Chowdhry* in immoral purposes ? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favour of the Plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards *Bolaki Chowdhry*. On the contrary, the words of the learned Judge who wrote the judgment of the Court are, " And this decision would, I think, have been perfectly fair and right were we dealing with *Bolaki Chowdhry* only." There is no doubt a subsequent passage to the effect that the onus was clearly on the Plaintiffs of shewing against the Respondents, who purchased at the execution, that the decree against *Adit Sahai* was an improper one, and that the evidence was insufficient to prove the fact.

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If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above mentioned, and the matters of fact involved in them against *Bolaki Chowdhry*, was insufficient to prove them against the Respondents, that ruling would, in their Lordships' opinion, be erroneous. The Respondents were parties to the suit, they went to trial upon those issues, and had equally with *Bolaki Chowdhry* the means of cross-examining the Plaintiffs' witnesses, and of adducing counter evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the Plaintiffs' suit as against the Respondents, viz., that upon the authority of the decision of this Board in *Muddun Thakoor v. Kantoo Lall*, the Respondents are to be treated on the footing of purchasers for value, without notice ; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be taken to affect the authority of *Muddun Thakoor's Case*, or of the cases which may have since been decided in *India* in conformity with it. The material passage of the judgment in *Muddun Thakoor's Case* is in these words :—

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right

J. C. in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the fathers ; that the property was property liable to satisfy the decree, if the decree had been given properly against them ; and he having inquired into that, and *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consideration for it, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defendant."

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The purchasers under the execution, it appears to their Lordships that the present case is clearly distinguishable from that of *Muddun Thakoor*, and does not fall within the principle laid down in the passage just cited. It has been seen that before the Respondents purchased, the claim of the Plaintiffs was preferred in the Court wherein the execution proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution proceeding, and accordingly allowed the sale to take place, but made an order referring the Plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the Respondents must be taken to have had notice, actual or constructive, of the Plaintiff's objections, and of the order made upon them, and therefore to have purchased with knowledge of the Plaintiff's claim, and subject to the result of this suit. It follows that, as against them as well as against *Bolaki Chowdhry*, the Plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt.

The question remains, Whether they are entitled to any and what relief as regards the father's share in this suit ? It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the

property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of *Fort William* were identical with that of *Madras*, the mortgage executed by *Adit Sahai* in his lifetime, as a security for the debt, might operate after his death as a valid charge upon mouzah *Bissumbhurpore* to the extent of his own then share. The difficulty is that, so far as the decisions have yet gone, the law, as understood in *Bengal*, does not recognise the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of *Adit Sahai's* death, the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment creditor, a valid charge upon the land, to the extent of *Adit Sahai's* undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-Western Provinces (1), already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognised the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deendyal Lat*. If this be so, the effect of the execution sale was to transfer to the Respondents the undivided share in eight annas of mouzah *Bissumbhurpore*, which had formerly belonged to *Adit Sahai* in his lifetime; and their Lordships are of opinion that, notwithstanding his death, the Respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will therefore humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely set aside the bond, the decree, and the execution sale, and in lieu thereof to make an order declaring that by virtue of the execution sale to them the Respondents acquired only the one undivided third share in the eight-anna share of mouzah *Bissum*.

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bhurpore, in the pleadings mentioned, which formerly belonged to *Adit Sahai*, with such power of ascertaining the extent of such third part or share by means of a partition as *Adit Sahai* possessed in his lifetime; and ordering that the Appellants be confirmed in the possession of the said eight-anna share of mouzah *Bissum-bhurpore*, subject to such proceedings as the Respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party Plaintiff is only partially successful. But the Appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

Solicitors for the Appellant: *Watkins & Lattey.*

Solicitors for the Respondents: *E. M. Hore.*

RAJ BAHADOOR SINGH DEFENDANT;

J. C.*

AND

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ACHUMBIT LAL PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Act IX. of 1871, Schedule—Limitation—Adoption.

The provision in the schedule to the *Statute of Limitations*, 1871, wherein it is enacted that with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the option of the Plaintiff) the date of the death of the adoptive father," does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued.

APPEAL from a decree of the High Court (May 5, 1875), affirming a decree of the Subordinate Judge of the zillah *Tirhoot* (Feb. 17, 1874).

The facts of the case are sufficiently set forth in the judgment of their Lordships.

* Present:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Cowie, Q.C., and C. W. Arathoon, for the Appellant.

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Leith, Q.C., and Doyne, for the Respondent.

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The judgment of their Lordships was delivered by

RAJ BAHADUR SINGH

SIR ROBERT P. COLLIER :—

ACHUMBIT LAL
ADVOCATE

In this case the Respondent (the Plaintiff) *Achumbit Lal* brought his suit to recover possession of certain property to which he alleged that he was entitled as joint heir with his brother one *Doorga Prosad*. The Defendant *Raj Bahadoor Singh*, to whom was joined the brother of the Plaintiff, claims under *Jusoda Chowdrain* the widow of *Doorga Prosad*, and the real question in the cause is whether, under a certain document called a *waseeutnamah*, executed by *Doorga Prosad* on the 24th of May, 1820, the widow's estate was enlarged from the ordinary estate of a Hindu widow to an absolute estate. The main contention in the Court below appears to have been that the document operated in the nature of a will, conferring upon her, or granting to her, an absolute estate; but the main contention before their Lordships had been somewhat different. It has not been seriously argued that the document conferred upon her or granted to her any estate which she had not before, but it is contended that it operates by its recitals as an admission on the part of *Doorga Prosad*, by which a person claiming under him would be bound, that the widow had in fact a joint interest with *Doorga Prosad* in the property which is the subject of the *waseeutnamah*, a part of which is claimed in this suit.

The case was heard before the two Courts in *India*, both of whom found in favour of the Plaintiff. The High Court was composed of Mr. Justice *Glover*, and a very learned native, Mr. Justice *Romeshchunder Mitter*, and those learned Judges had the original document before them. They appear to have considered that the translation which is now in the Record was to some extent imperfect, and they gave their decision upon the construction which they put upon the original document. It would have been more satisfactory to their Lordships if they could have had before them the translation of the document on which the High Court

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relied, and they cannot help thinking that it was incumbent on the Appellant, who desires to satisfy them that the High Court was wrong, to furnish them with that translation, or at all events some information with reference to it. As it is, however, their Lordships must deal with the document which is before them. Undoubtedly it is somewhat ambiguous in many of its expressions, but they think it clear, as has been before observed, that there was no intention on the part of *Doorga Prosad* to grant any new estate to this lady ; and they do not see their way to differ from the construction which was put upon it by the High Court, and which is expressed in these terms in the judgment of Mr. Justice *Glover*, agreed to by Mr. Justice *Mitter* : " I take the meaning of *Doorga Prosad* to be, that feeling old and unable to manage the complicated affairs of a large estate, and knowing that his wife, a *purdanashin* lady, would likewise be incompetent to the business, he agrees to pay a manager to take all the trouble off their hands, and to do so at once. He speaks of his wife as being joined with him as owner, but these words cannot be taken literally, as throughout the document he speaks of himself as the sole proprietor, and all his arrangements are made with reference to his own comfort and advantage in the first instance. *Jusoda Chowdhryain* is to get nothing till his death. The warning given to his other heirs refers to the time between his own death and *Jusoda's*. That the lady herself did not understand the *waseeutnamah* to be a will giving her the property to dispose of after her death is clear from her own statement" in another suit. Their Lordships, on the whole, are not prepared to disagree with this view, which was taken by the learned Judges of the High Court, and this construction of the document disposes of the main point in the case.

It only remains to notice two subsidiary questions. The widow executed, on the 7th of July, 1851, a putnee lease in favour of *Raj Bahadur Singh* of two out of three of the mouzabs which are the subject of this suit, and part of the prayer of the claim is that that putnee lease be set aside. Inasmuch as it has been found as a fact by both Courts that there was no necessity for borrowing the sum for which the putnee was granted, it follows that if the widow had no more than a Hindu widow's estate the putnee could only bind her life interest. It appears that the lady also executed

what has been called a deed of adoption on the 24th of May, 1860, by which she professed to adopt, in pursuance of the permission of her husband, who had died in 1825, the father of *Raj Bahadoor*, to whom the putnee had been granted, and *Chuturdhari Lal*, the brother of the Plaintiff and a Defendant, and to make over to them her property. But the gift was not to take effect until her death, possession being retained by her during her lifetime. It has been admitted on the part of the Appellants that this document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. A part of the claim is that this document also be cancelled. Upon this part of the case a question has been raised concerning the *Statute of Limitations*, and the schedule to the *Statute of Limitations* of 1871 has been quoted, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the option of the Plaintiff) the date of the death of the adoptive father." On the above view of the document, the words of the statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the Plaintiff whether it be set aside or not. Their Lordships however think it well to say that the decree of the Court below in setting aside this document and the putnee lease, must be considered to have in effect decided no more than that the Plaintiff was entitled to recover notwithstanding those documents, without in any degree compromising any rights which other parties may have under them.

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J. C. Their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

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Solicitors for the Appellant : *Henderson & Co.*

Solicitor for the Respondent : *E. M. Hore.*

J. C.* NARAYANRAO RAMCHANDRA PANT . . DEFENDANT ;

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March 15, 18. AND

— RAMABAI, WIDOW OF RAMACHANDRA PANT. PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

(*Limitation—Claim to Maintenance—Act XIV. of 1859, s. 1, sub-s. 13.*

A suit for maintenance and arrears under a will is not barred after the expiration of twelve years from the testator's death under Act XIV. of 1859, sect. 1, sub-sect. 13, unless the will which confers the right thereto also creates in favour of the Plaintiff a charge on the inheritance of the testator's estate.

By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled.

APPEAL from a decree of the High Court at *Bombay* (April 27, 1875), affirming a decree of the Subordinate Judge at *Dharwar* (September 18, 1874), except so far as it varied the amounts awarded by the latter Court to the Respondent.

The facts of the case are set out in the judgment of their Lordships.

The judgment of the High Court determined two questions only, viz., whether the testator intended to make the widow's living with the Appellant in joint family a condition precedent to the right of the widow to maintenance, and the amount of maintenance, and decreed that the Judge's order should be amended by substituting Rs.14,400 in lieu of Rs.21,600 ordered thereby to be paid to the Respondent, and substituting Rs.200 for Rs.300 the amount of monthly maintenance awarded thereby.

* Present :—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Benjamin, Q.C., and Myburgh, for the Appellant, contended that the Respondent's claim as well to future maintenance as to arrears of maintenance was barred. Under the will of *Ramchandra Pant* the Appellant was not bound to provide separate maintenance at all to the Respondent, who, moreover, was merely the Appellant's step-mother, and had a son of her own. She resided with that son. He was in a position to maintain her out of his share of the family property. There had been a partition of the family property in the life time of the testator, and the Respondent had at that time received a share in lieu of maintenance. Reference was made to the report of the former litigation between the parties in 9 *Moore's Indian Appeals*, p. 101; to Act XIV. of 1859, sect. I, cl. 13; and to *Timmappa Bhat v. Parmeshriamma* (1).

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The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

This was a suit brought by *Ramabai*, the widow of *Ramchandra Pant*, against *Narayanrao Ramchandra Pant*, his eldest son, to recover arrears of maintenance. The claim states: "The liability to maintain me according to the dignity of my family rests, under the Hindu law, with the Defendant." *Ramchandra Pant* was subadar in the service of the Maharajah, the ex-Peishwa. He died on the 22nd of July, 1855, leaving two wives, and children by each. The Defendant was the step-son of the widow *Ramabai*, the plaintiff. A great deal of litigation has taken place in this family, owing to disputes which arose immediately after *Ramchandra Pant*'s death. He left a will which was disputed by his younger sons, and an action was brought, which ultimately came upon appeal to Her Majesty in Council. After considerable discussion of the evidence, which had been given at great length, the will was established. Another suit was brought by the widows to recover some jewels which they alleged to be their property under the will of the testator, in which the widows failed, it being decided that the jewels to which they might lay claim under the

(1) 5 *Bomb. H. C. R. (A. C.)* 130.

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will were in their own possession. This antecedent litigation does not materially affect the question arising in the present suit, except so far as it shews the state of hostility in the family, and accounts for the withholding by the Defendant of the maintenance to which the Plaintiff was entitled. The present suit was brought on the 18th of October, 1871.

One point now raised is that the maintenance is barred by limitation; the other point is that the maintenance is payable under the will of *Ramchandra Pant*, and that it is a condition precedent to the right to obtain it that the widow should live under the same roof in joint family with the defendant. Those are the two principal points which have been raised. A third point is that there has been no demand and refusal of the maintenance.

The case has been tried in the Courts below upon several issues which it is not necessary to mention in detail, inasmuch as the three points just indicated are those which alone are relied upon at the bar. The result of the suit in the Courts in *India* was that the Subordinate Judge awarded a sum of Rs. 300 *per mensem* to the Plaintiff for maintenance, and gave her arrears for six years amounting to Rs. 21,000. The High Court reduced the monthly allowance to Rs. 200, and proportionately reduced the amount of arrears, giving the sum of Rs. 14,400.

To comprehend the argument on the points which alone remain for decision it is necessary to refer to the will of *Ramchandra Pant*. It is stated in the report of the appeal to Her Majesty in 9 *Moore's Indian Appeals*, p. 101. Mr. *Benjamin* read the will from this report. It is thus stated: "The effect of it, according to the English translation as made in the Zillah Court, was to declare that the testator was seventy-five years of age, that his eldest son had two sons and one daughter, and that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives and to pay them proper respect, and to provide also for his younger brothers and for the testator's depen-

dents ; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents of two villages mentioned in the will, and pay over the proceeds to his younger brothers as such proceeds were from time to time received, and he was further to pay to each the sum of Rs.25,000. The testator then gave Rs.13,000 for the benefit of his granddaughter, the daughter of the Appellant, on her marriage, and allotted Rs.40,000 for what he calls the customary outlay in the first year after his death, including religious pilgrimages." The words of the will relating to the points in issue, according to one of the translations in the present record, to which attention was called by the learned counsel during the argument, were : " *Nana*, the eldest son, shall provide for both the mothers, treating them with great respect ; and he shall regard each of his two younger brothers as a son, providing for them, and my old servants, in a manner befitting their several conditions in life."

The testator's property appears to have been self-acquired, and consisted of some villages and large sums of money in Government paper, and other personal property, and he refers in his will to an expected pension from the East India Company. It has been conceded at the bar that whatever was given by the testator to his wives in his lifetime was not given in lieu of maintenance ; in fact, all that was given to them were some jewels, no doubt of considerable value. Nor has any question been made at the bar that if the Plaintiff is entitled to succeed, the amount awarded by the High Court is excessive. The only questions are those which have been already mentioned.

The first question arises upon the *Statute of Limitations*, and it is contended that this action is barred altogether, both for the maintenance and the arrears, by sub-sect. 13 of the 1st section of Act No. XIV of 1859, which is in these terms : " To suits to enforce the right to share in any property, moveable or immovable, on the ground that it is joint family property ; and to suits for the recovery of maintenance, where the right to receive such mainte-

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nance is a charge on the inheritance of any estate ; the period of twelve years from the death of the persons from whom the property, alleged to be joint, is said to have descended, or on whose estate the maintenance is alleged to be a charge." It was contended that under the will of the testator the maintenance is made by the will a charge upon the estate. The effect of the will is, no doubt, to give the whole property of the deceased to the eldest son, mainly because he appears to have had more confidence in his eldest son than in the younger ones. But whilst giving the estate to the eldest son he recognises the claims by Hindu law of the younger brothers and the widows to maintenance. He makes specific provisions with regard to the younger brothers, giving them the profits of particular villages, but he makes no specific arrangement for the widows. He merely requires that they should be maintained, and treated with proper respect. He creates no charge on any specific portion of his property, but imposes an obligation upon the Defendant to make allowances for the support of the widows of a kind analogous to the maintenance to which widows by Hindu common law are entitled, supposing probably that by his will he might have interfered with that law. It is to be observed that in the former suit brought by the widows they claimed under the will and to take the benefit of it.

Assuming this to be the proper construction of the will, their Lordships think that the Subordinate Judge was right in his conclusion that it did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in the 13th sub-section of the statute.

The language of the Act is not very clear ; and by two subsequent Statutes of Limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow ; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

The only authority cited by the Subordinate Judge is the case of *Timmappa Bhat v. Parmeshriamma* (1), which sustains his judg-

ment, though the facts are not altogether the same as the facts of the case now under appeal. No decision was cited at the bar opposed to the construction which the Subordinate Judge has put upon the Act.

Their Lordships have observed with some surprise that no mention of this point, which is undoubtedly one of some importance, was made in the judgment of the High Court, and they think that when an Appellant comes to complain of the judgment of a Court upon a point which does not appear upon their judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear. It may be that this point was disposed of in the course of the argument. In the absence of explanation the High Court must be taken to have agreed with the Subordinate Judge.

The second point made was that the Plaintiff has disentitled herself to maintenance by separating from the son and living apart from him. It is argued that it was made a condition of the will to entitle her to maintenance that she should reside under the same roof and in joint family with him. Their Lordships, however, think that no such condition is to be found in the will, and that she was to be left in this respect in the ordinary position of a Hindu widow, in which case separation from the ancestral house would not generally disentitle her to maintenance suitable to her rank and condition.

It was then said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused ; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it.

These observations dispose of all the points which have been raised at the bar, and their Lordships think that this appeal fails, and they will humbly advise Her Majesty to affirm the decree of the Court below.

Solicitors for the Appellant : *Brooks, Jenkins, & Co.*

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 —————
 March, 18. KRISHNASWAMI TATA CHARIAR AND } DEFENDANTS.
 OTHERS

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Act VIII. of 1859, S. 32—Cause of Action—Right to perform Religious services.

A suit will lie to recover dues for certain religious services performed ; and if to determine the right thereto it becomes necessary to determine incidentally the right to perform certain religious services, the Court has jurisdiction so to do.

APPEAL from a decretal order of the High Court (Feb. 16, 1877) confirming an order of the District Judge of *Chingleput* (Dec. 21, 1876,) whereby he rejected a plaint preferred by the Appellants on the ground that it disclosed no cause of action.

The question was whether upon the facts alleged in the plaint any relief could be given. Those facts, as also the proceedings in the case, are stated in the judgment of their Lordships.

Mayne, for the Appellant, referred to *Narasimma Chariar v. Sri Kristna Tata Chariar* (1). He distinguished *Striman Sadagopa v. Kristna Tatachariyar* (2), the Plaintiff in that case not being an officer of the temple, but an outsider, and the subject matter relating exclusively to rights which were not of a civil nature ; *Archakain Srinavasa Dikshatulu v. Udayagiry Anantha Charlu* (3), where, though it was held that the particular suit must be dismissed as *res judicata*, a suit of this kind was treated as admissible. He referred also to *Kamalum v. Sadagopa Sami* (+) ; *Shankara bin Marabasapa v. Hanma bin Bhima* (5).

*Present :—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 6 Madras, H. C. R. 449.

(3) 4 Madras, 349.

(2) 1 Madras, H. C. R. 301.

(4) Ind. Law, Rep. 1 Madras, 356

(5) Ind. Law, Rep. 2 Bombay, 470

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SIR ROBERT P. COLLIER :—

This is an appeal from a judgment of the High Court of Judicature at *Madras* rejecting a plaint under the 32nd section of the *Code of Civil Procedure* as containing no cause of action, a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the Tenkalai sect against other persons belonging to the Vadakalai sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated : It begins by declaring that the Plaintiffs have the exclusive right to the **Adhyapaka** Mirass of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and deny the right of the Defendants to recite them. Then comes an allegation which appears important : "The Plaintiffs and the Brahmins of the Plaintiffs' Tenkalai sect have been for a long time past and up to this day discharging all the duties appertaining to the said **Adhyapaka** Mirass right, and enjoying the incomes of the **Adhyapakam**, save those mentioned in Schedules B. and C." The plaint goes on to allege that the Defendants, holding the office of **Dharmakarta** of the pagoda, in combination with other persons in rivalry with the Plaintiffs, recited the Vadakalai invocations, chants, and other religious prayers, the exclusive right to recite which was incident to the Plaintiffs' **Adhyapaka** Mirass ; that thereupon a complaint was preferred to the magistrate and a report made, and for a time the Defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the Plaintiffs and others to recite them ; but there is no allegation that the Plaintiffs did not themselves perform or were prevented from performing

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 1879 perform them. Sect. 6 goes on to say : " The Defendants having
 TIRU withheld the payment to the Plaintiffs of some of the several
 KRISHNAMA incomes of the Adhyapaka Mirass due to the Plaintiffs in the
 CHARIAR said Devaraja Swamis Pagoda, as well as in all the Sannidhis
 v. attached to it, the Plaintiffs instituted suit No. 66 of 1865, on
 KRISHNA the file of the District Munsif's Court of *Conjeevaram*, against the
 SWAMI TATA Defendants, and this litigation went up as far as the High Court,
 CHARIAR. and continued until March, 1873, when a decision was passed in
 favour of the Plaintiffs." The plaint further alleges (and this is
 the present cause of action), " The Defendants have withheld the
 payment to the Plaintiffs and the others of the Tenkalai sect of
 the amount of income mentioned in Schedule C. for the six years
 from the date of the said suit No. 66 up to this day, to which the
 Plaintiffs and the others of the Tenkalai sect are entitled, as also
 of the incomes which are mentioned in Schedule B., and which
 were being enjoyed by the Plaintiffs and the others of the Ten-
 kalai sect from the date of the said suit No. 66 until the final
 decree was passed by the High Court, save such as are now being
 enjoyed. They have also withheld from the Plaintiffs and the
 others of the Tenkalai sect the honours mentioned in Schedule A,
 from April, 1873." There follows a prayer that the Court will
 pass a decree directing the Defendants and others to abstain from
 reciting, and establishing the exclusive right of the Plaintiffs, and
 also seeking to recover the value of various items stated in the
 schedules. Schedule C., which is to be found at the end of the
 schedule attached to the plaint, is in these terms : " Amount due
 for six years from October, 1870, up to the current month at the
 annual rate of Rs.57. 5a. 9p., as mentioned in the decree in the
 original suit No. 66 of 1865 on the file of the District Munsif's
 Court of *Conjeevaram*, Rs.344. 2a. 6p." On reference to the
 record, this suit appears to have been brought by substantially
 the same Plaintiffs (with some changes) against substantially the
 same Defendants. The Munsif, before whom the case was ori-
 ginally tried, affirmed the claim of the Plaintiffs to the Adhya-
 pakam Mirass, and decreed that the sum of Rs.57. 5a. 9p., as
 wages for the duty performed, should be paid to them by the

Defendants, these "wages" being in fact the money value placed by the Court on certain payments in kind chiefly in the shape of food.

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On appeal this decision of the Munsif was reversed by the District Judge, being the first Court of appeal, on the ground that no suit would lie in respect of the matter complained of. His decision was reversed by the High Court of *Madras*, who remanded the case, observing, "The claim is for a specific pecuniary benefit to which Plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point." In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of first appeal, which somewhat increased the amount that the Munsif had given. The High Court upon further appeal affirmed the judgment of the Munsif, re-establishing the amount by way of annual payment at Rs.57 5a 9p. It therefore appears that the Plaintiffs in the present suit, having recovered in the former suit up to the date of the commencement of that suit the sum of Rs.57 for certain services performed, are now seeking to recover the amount of wages that have accrued due to them for six years since the date of that suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with, by the Defendants. So much with respect to Schedule C.

Schedule B, relates to another class of payments, as they are described in the schedule, in kind; that is, in the shape of rice and other food which are described as due to the Plaintiffs. The first item in the schedule is to this effect: "One *Poli* (circular cake made of wheat, flour, *Bengal* grain, sugar, and ghee) due to "Adhyapakam at the close of the Tiruppavai." Most of the other

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items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature as those comprised in Schedule C., which are now claimed by the Plaintiffs from the Dharmakartas of the temple, which the Defendants are, in respect of services performed. At the close, however, of this schedule their Lordships observe a statement of an approximate sum claimed for presents made annually to the Adhyapakas by the adjoining villagers for the Tenkali people. It may be that no action will lie for the recovery of this last item, or in respect of the honours mentioned in Schedule A, and alleged to have been withheld from the Plaintiffs; but that circumstance would not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of Schedule C. and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms: "We think the plaint was properly rejected under the 32nd section of the *Code of Civil Procedure*. The allegations respecting the 'Mirass of reciting prayers,' and the exclusive right of recital in a stated form and order which the Plaintiffs ask the Court to establish and to protect from infringement by the Defendants, do not disclose a cause of action; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B. and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the Plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated they take a different view of the plaint and of the schedules which have been referred to. It appears to them that the schedules are more than a mere list of cakes and offerings to which a money value is assigned, that they

disclose a claim, whether well founded or ill founded, as of right to certain dues for services performed : Schedule C. to an annual payment for wages which has been assessed in the previous suit, and adjudicated upon as due to them. Schedule B. to certain other payments in kind, presumably capable of a money value, which had been made to them up to the judgment in the former suit, but which have been since withheld.

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This being so, the action falls within the principle of the judgment by which the former suit was remanded, and of other cases to which their Lordships' attention has been called. They are therefore of opinion that the judgment should be reversed, and the case remanded for the purpose of trial, and that the Appellant is entitled to the costs of this appeal ; and they will humbly advise Her Majesty to this effect.

Solicitors for the Appellants : *Burton, Yeates, & Hart.*

J. C.* STUART SKINNER ALIAS NAWAB MIRZA . PLAINTIFF ;
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March 20, 21. AND
 ————— WILLIAM ORDE AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Practice—Petition to sue in forma pauperis is a Plaintiff from the Date on which it is filed—Act VIII, of 1859, ss. 308, 310—Transfer of Suits—Act VIII of 1859, ss. 11, 12, 13.

On the 20th of February, 1873, a petition was presented in the *Meerut* Court setting out all the particulars required in a plaint, and praying *bona fide* that the plaintiff might be allowed to sue *in forma pauperis*, and was rejected. It was subsequently filed in the *Delhi* Court which, on the 14th of April, 1873, ordered that the Plaintiff's suit be admitted *in forma pauperis*, but the High Court of the *Punjaub* directed "that the plaint should be return to the plaintiff, with instructions that he should present it to some Court in the *North-West Provinces*;" and eventually, on the 19th of July, 1873, the *Meerut* Court ordered "that the case be brought on the file and numbered." Questions having been raised whether the finding of pauperism in the *Delhi* Court availed in the *Meerut* Court, the Plaintiff on the 27th of November, 1874, paid the proper stamps into Court.

Held, that the petition of plaint filed and numbered on the 19th of July, 1873, although so much thereof as asked to be allowed to sue *in forma Pauperis* was given up when the stamp fees were paid into Court, must be considered as a plaint from the date on which it was filed, and not, as the High Court held, from the date on which the stamps were paid.

Quære whether the High Courts of the *North-West* and the *Punjaub* had power under Act VIII of 1859, ss. 11, 12, 13, to transfer the suit from the *Delhi* Court to the *Meerut* Court in the same position in which the suit stood before it was transferred, so as to import into the suit when filed in the latter Court the finding to which the former had come upon the issue of pauperism.

APPEAL from an order of the *Allahabad* High Court (May 29, 1876), dismissing an appeal from an order of the Subordinate Judge of *Meerut* (July 6, 1875).

The nature of the above orders and the circumstances under which they were made, sufficiently appear in the judgment of their Lordships.

The judgment appealed from was as follows :—

"The cause of action in this suit accrued to the Plaintiff in

* Present :—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER

April, 1861, when his father died, and the period during which the suit might legally be brought is twelve years. If the suit can be held to have been instituted on the 20th of February, 1873, the date on which the application for permission to sue *in forma pauperis* was first presented to the Subordinate Judge of *Meerut*, it is clearly within time, and there can be no doubt that had the application of the 20th of February, 1873, been granted, the suit would rightly be deemed to have been instituted on that date. But that application never was granted, and was indeed virtually withdrawn on the 27th of November, 1874, by the Plaintiff's offer to pay the amount of the fee chargeable on the plaint under the *Court Fees Act*, before the inquiry into his pauperism had been concluded, and his application was not numbered and registered and assumed to be the plaint in the suit under the provisions of sect. 308, Act VIII of 1859, in consequence of proof of his pauperism, but in consequence of the payment by him of the proper fees. But there is no provision in the law which allows the application presented under sect. 299 of the Code to be deemed the plaint in the suit, when such application has been in effect revoked and superseded by the payment of the fees chargeable under the *Court Fees Act*. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees, and we are therefore unable to rule that the Lower Court has erred in declaring the present suit to have been instituted after the lapse of the period allowed by the law.

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"We have no alternative but to dismiss the appeal with costs."

Mayne, and C. W. Arathoon, for the Appellant :—

The orders appealed from are erroneous both under the proceedings held in the suit and according to the law on the subject. The application to sue *in forma pauperis* was granted after a finding of pauperism on the 14th of April, 1873, by a Court which had concurrent jurisdiction with that of *Meerut*. It was subsequently granted by the *Meerut* Court on the 19th of July, 1873, and that application was ordered to be numbered and registered as the plaint in the suit. See Act VIII of 1859, sect. 308. Then again on the 19th of December, 1874, after going into evidence as to the

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pauperism, the application was again numbered and registered according to sect. 308 and this latter finding was conclusive as to the fact of pauperism. Reference was made to Act VIII of 1859, sects. 297, 299, 303, 304, and 305, and to sect. 4 of Act IX of 1871 ; explanation.

As to whether the finding of the *Delhi* Court with regard to pauperism could be imported into the suit when restored to the *Meerut* Court, see Act VIII of 1859, sects. 11, 12 and 13. Those sections relate to suits where the property is in different districts. The *Meerut* Court had jurisdiction to receive the plaint. The sections assume that all that is necessary to bring the proceedings into the form of a suit (as for instance in this case the finding as to pauperism) has been done, and thereafter the proceedings in the suit must have the sanction of the Sudder Court. The finding of the *Delhi* Court was conclusive as to pauperism, and the *Meerut* Court was bound to accept it : see *Seetaram Gower v. Golubnauth Dutt* (1). The *Delhi* Court ought to have done that which the *Meerut* Court did, viz., number and register the application. The plaint, moreover, was transferred by consent of the High Courts of the *Punjab* and the *North-West Provinces*. The *Meerut* Court accepted the suit as a transferred suit. The finding of the 19th of December, 1874, shewed that he had been a pauper all along, and it related back to the order of the 19th of July, 1873.

Leith, Q. C., and Doyne, for the Respondents :—

The suit is barred by limitation. There was no valid finding as to pauperism till the 19th of December, 1874, and therefore there could have been no valid admission of a pauper petition until that date, whilst the cause of action admittedly arose in April, 1861. The *Delhi* Court had no power to determine whether the Plaintiff was entitled to sue as a pauper in another jurisdiction though the Judge thereof might have done so for his own Court. The Appellant might be a pauper before one Court and yet not a pauper at the date of presenting his application to another Court. [SIR MONTAGUE E. SMITH :—This suit was not brought in a Court without jurisdiction : see sect. 11. Had the *Delhi* Court jurisdiction to determine whether the Plaintiff was a pauper before he had applied

for leave to the High Court to hear the case?] It is admitted that the *Delhi* Court had such jurisdiction as regards a suit which it retained ; but it is contended that the *Meerut* Court was entitled and bound to determine the same point as regards a suit therein. This is not the case of a transferred suit. The *Punjaub* Chief Court could only forbid its own subordinate Court to try the case ; it left the parties free as to going before another Court. There was no authority to transfer, and no order of the *Punjaub* Court was binding on the *Meerut* Judge. There had been no conference or agreement between the two High Courts. The Plaintiff began *de novo* in the *Meerut* Court, and abandoned the former application to sue *in forma pauperis*. There was no plaint, because the claim to be a pauper was not admitted in the *Meerut* Court : see Act VIII of 1859, sect. 310, as to what a Plaintiff must do whose application to sue *in forma pauperis* was not admitted. [SIR MONTAGUE E. SMITH :—The Court could have allowed the old plaint to stand, and yet they say it is only to date from the payment of stamps.] It is not a plaint at all until it is stamped ; see Act VII of 1870, sect. 6. [SIR BARNES PEACOCK :—May it not be stamped *nunc pro tunc*? SIR MONTAGUE E. SMITH :—There is a section in the *Limitation Act* relating to abortive proceedings.] Yes ; sect. 15 of Act IX of 1871 ; but due diligence is required thereby and there must have been an actual suit. [SIR MONTAGUE E. SMITH. May not a stamp be added in the same way as if a plaint had been filed with too small a stamp?] A wholly unstamped plaint cannot be received at all.

Mayne, replied :—

If the *Punjaub* Chief Court had no authority in this case the *Meerut* Judge should not have taken up the case, and every proceeding subsequent to his doing so has been *coram non judice*. He should have asked authority from the High Court of the *North-West*. If there was no consent on the part of the latter High Court, then the proceedings of the *Meerut* Court ought to be quashed as had without jurisdiction, and the Plaintiff would be entitled to recommence deducting the time which they have occupied from the period of limitation. The pauperism was *res judicata*. [SIR MONTAGUE E. SMITH :—Not if the suit was a

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new one, it was not a point in the cause, but a mere matter of procedure.] The effect of the subsequent payment of stamps does not prejudice the Appellant in the absence of a finding that he was not a pauper at the date of his application. Reference was made to Act VIII of 1859, sects. 306, 310, and on the question of stamps to sect. 31, and to Act IX of 1871, sect. 4, explanation.

The judgment of their Lordships was delivered by
SIR MONTAGUE E. SMITH :—

The decision of this appeal is attended with considerable difficulty since it presents a case which is not provided for by the *Code of Civil Procedure*. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the *Statute of Limitations* is a bar to the claim of the Plaintiff. The original petition was filed in the Court of the Subordinate Judge of *Meerut* on the 20th of February, 1873. The claim of the Plaintiff was to a share of the property devised by the will of the late Colonel *Skinner*. His claim arose upon the death of his father, Major *Skinner*, which occurred on the 27th of April, 1861. The petition set out all the particulars required in a plaint, and prayed that the Plaintiff might be allowed to sue *in forma pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the *North-West Provinces*, and partly within the jurisdiction of the Chief Court of the *Punjaub*. The Judge of *Meerut*, apparently of his own motion, rejected the petition, on the ground that the question of the Plaintiff's pauperism could be more conveniently tried in the *Punjaub*. The Plaintiff thereupon filed it in the Court of the Deputy Commissioner of *Delhi*, and on the 14th of April, 1873, an order was made by that Court, after examining witnesses, admitting the Plaintiff's suit *in forma pauperis*. Before proceeding further with the suit the Deputy Commissioner applied to the High Court of the *Punjaub* for authority to proceed under clause 13 of the *Code of Civil Procedure*. That clause enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts the application shall be submitted to the Sudder Court to which the district in which the

suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th of May, 1873, the Chief Court of the *Punjaub*, presumably not without having consulted the High Court of *Allahabad*, directed that "the plaint should be returned to the Plaintiff, with instructions that he should present it to some Court in the *North-West Provinces*." Accordingly the Plaintiff took the proceedings back to the Court of *Meerut* from which he had been originally driven, and on the 19th of July, 1873, an order of the Subordinate Judge of *Meerut* was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of *Delhi* that the Plaintiff was a pauper can be imported into the suit when it found its way upon the file of the Court at *Meerut*, and that depends upon the construction to be given to clauses 11, 12, and 13 of the *Code of Civil Procedure*. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at *Delhi*, it would be convenient and proper when an application had been made by the Judge of the *Delhi* Court to the Chief Court of the *Punjaub*, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have the power to direct that the cause should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favour of the Appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they

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think it would be a proper addition to be made to this clause, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of *Meerut*, and whether the judgment of the High Court affirming that of the Subordinate Judge of *Meerut* is correct in holding that the suit is to be considered as instituted when the Plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point it will be necessary to refer to some of the proceedings. The order of the 19th of July, 1873, directing the case to be put on the file and numbered has been already adverted to. When that was done the Defendants put in written statements objecting that the Plaintiff ought to establish his position as a pauper in the *Meerut* Court, treating what had taken place at *Delhi* as irrelevant, and upon those statements, on the 10th of November, 1873, the Subordinate Judge of *Meerut* directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th of July, 1874, the High Court held that the time of the abortive proceedings at *Delhi* should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the Plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed was the 27th of November, 1874. On that day the Plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the Plaintiff paid the proper stamps into Court. That having been done, the Defendants raised two objections; first, that the suit ought not to proceed, because the Plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the date the Court fee was paid, which was beyond the period of limitation.

The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the Plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed in good faith. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added, "The Court then would allow the case to proceed on its present basis, but at the same time would suggest to the Defendant the advisability of appealing to the High Court to determine whether by the substitution of the institution fee the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in forma pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision; first, "Can an 'application' to be allowed to sue *in forma pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated?" the second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th of July, 1875, he gave judgment. Having referred to the dates of the application to sue *in forma pauperis*, and to some of the other dates of the proceedings, he says, "The granting of the application then constitutes an essential ingredient to further progress as an ordinary suit, with the privilege of limitation counting from the day the petition to sue *in forma pauperis* was presented, and not from the date when it was registered under sect. 308. But it will be seen that before the application to sue *in forma pauperis* was granted, and whilst the question was still under inquiry and investigation, the Plaintiff converted the matter into a regular suit, the consequence of which is that he has by his own act given up the

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advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the Plaintiff out of Court." No doubt, if the Judge is right, the Plaintiff would be barred by the *Statute of Limitations*, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under sect. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the *Court Fees Act*. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in forma pauperis* contains all that a plaint is required to do. By sect. 300, "The petition shall contain the particulars required by sect. 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and plus these a prayer that the Plaintiff may be allowed to sue *in forma pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by sect. 308. It also provides by sect. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that unless the petition was

rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the Plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the Plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The Defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there then anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the Plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical they should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th of July, 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by sect. 308 than that contemplated by sect. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious

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that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the Plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the considerations which would determine the judgment would then have been different.

Their Lordships have only to advert to the *Statute of Limitations*, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in clause 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The Respondents must pay the costs of the appeal.

Solicitor for the Appellant : *T. L. Wilson.*

Solicitors for the Respondents *Orde* and *J. Skinner* : *Young, Jackson, & Beard.*

SAYAD MIR UJMUDIN KHAN VALAD MIR } PLAINTIFF; J. C.*
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ZIA-UL-NISSA BEGAM AND OTHERS . . . DEFENDANTS.

TWO CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Mahomedan Law—Willa—Heritable Rights of Slave Emancipator—Act V of 1843, s. 3.

Assuming that by the law of Willa the emancipator of a purchased slave is entitled to succeed and take the property of which such slave dies possessed or entitled, to the disinherison of her own natural heirs; such right of inheritance is taken away by Act V of 1843, s. 3, which was in force at the date of the emancipated slave's death, *i.e.*, when the succession opened.

Act V of 1843 is a remedial statute, entitled to the widest operation which its language will permit.

APPEALS from a judgment of the High Court and two consequent decrees (April 21, 1875), affirming decrees of the Acting Judge of the District Court of *Surat* (Nov. 28, 1872).

The question decided in this appeal was as to the effect of Act V of 1843 on the status of an emancipated slave, and on the descent of her estate.

The facts of the case are set forth in the judgment of their Lordships.

Scoble, Q. C., and *Doyne*, for the Appellant, after submitting that upon the evidence *Amir-ul-Nissa* was an emancipated slave, contended that in that view the Appellant was, as the legal personal representative of *Fatma-ul-Nissa Begum*, deceased, entitled to succeed to the estate of *Amir-ul-Nissa* to the exclusion of the Respondents, who are her grand-daughters and natural heirs. *Fatma-ul-Nissa*'s title accrued to her as the sister and heiress of *Moinooldin*, the male heir of *Afzaluddin*, who had emancipated *Amir-ul-Nissa*. The title of the emancipator to succeed under

* Present:—SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, and SIR MONTAGUE E. SMITH.

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such circumstances was clear according to the provisions of Mahomedan law. An admission had been recorded by the District Judge, as made by the Respondents, "that if *Amir-ul-Nissa* were proved to have been a slave purchased in strict accordance with that law, the descent of the property would be as alleged by the Appellant."

Reference was made to *Macnaghten's Mahomedan Law (Madras Ed.)* Glossary, under heading *asbah*; to *Hidayah*, vol. iii, pp. 436-444, bk. xxxiii of Willa; *Ramsay's Al Sirajiyah*, p. 14; *Baillie's Mahomedan Law*, ch. 1, p. 386; *Tagore Law Lectures (1873)*, p. 88, and note to pp. 89, 90.

As to the effect of Act V of 1843, it was contended that the emancipator had died before the Act was passed, and that a vested interest could not be touched by an Act not retrospective in its terms. *Amir-ul-Nissa* was not a slave at the date of the Act's passing. The emancipation was in 1825; the death of the emancipator in 1842; of the emancipated slave in 1857. The emancipation of slaves is a meritorious act in the eyes of Mahomedan law, and is recommended in the Koran. The emancipator, by way of compensation or inducement, has rights of inheritance to his ex-slave. The intention and effect of Act V of 1843 was merely to remove personal disabilities arising from the condition of slavery, and not to alter the Mahomedan law of succession: see *Macnaghten's Principles of Mahomedan Law*, Ch. ix, art. 11. The case of a freed woman is not within the Act.

Leith, Q.C., and *Mayne*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The question in this appeal regards the succession to one *Amir-ul-Nissa Begam*, who died in 1857. The short history of the case is this: *Afzaluddin*, who was the last recognised Nawab of *Surat*, died on the 8th of August, 1842. He left two wives, *Amir-ul-Nissa Begam* and *Padsha Begam*. He also left a daughter, *Bakhtiar-ul-Nissa Begam*, whom we may take for the purpose of

this decision to have been born on the 13th of March, 1821, some four years before the marriage of *Afzaluddin* with *Amir-ul-Nissa Begam*. *Bakhtiar-ul-Nissa Begam* had been married in her father's lifetime to *Mir Jafir Aly*, and the issue of that marriage was two daughters, the Respondents. Immediately after the death of the Nawab in 1842, there arose considerable discussion regarding the right of succession to him, and there was a contest before one of the Government officers, Mr. *Elliott*, on that subject. No final decision, however, appears to have been come to until after the passing of Act XVIII of 1848, which placed the administration of the estate of the late Nawab at the disposal of the Governor of *Bombay* in Council, leaving to them to determine who were entitled to succeed. Their course of action under that Act was to refer the matters in dispute in the first instance to Mr. *Frere*, the then agent in *Surat*. A question as to the *status* of *Amir-ul-Nissa Begam* was raised before him, it being alleged that she had been a purchased slave of *Afzaluddin*; that while she was in that state the daughter *Bakhtiar-ul-Nissa Begam* was born, and that four years after the birth of *Bakhtiar-ul-Nissa* the Nawab, having shortly before the ceremony emancipated her, had married her. This case was then put forward in order to meet the question raised whether, according to Mahomedan law, *Bakhtiar-ul-Nissa Begam* could take any share in her father's estate. As the daughter of a concubine who was a slave girl, she would have been entitled to do so, whereas the illegitimate daughter of the Nawab by a free woman she might not be. She, therefore, and her husband, who acted for her, were then interested in making out that *Amir-ul-Nissa Begam* had been a slave, whilst the residuaries, who are now represented by the Plaintiff and Appellant, were interested in maintaining the contrary. Mr. *Frere*, without deciding anything as to the status of *Amir-ul-Nissa Begam*, but proceeding very much upon the special power that belonged to the Nawab, and the acts of recognition on his part of *Bakhtiar-ul-Nissa Begam* as his daughter, and *Amir-ul-Nissa* as his wife, reported that the succession was to be divided as follows, viz.: that one-sixteenth was to go to *Amir-ul-Nissa Begam*; another sixteenth, making up the eighth to which the widows are entitled under Mahomedan law, was to go to *Padsha Begam*, the other widow; that *Bakhtiar-ul-*

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J. C. *Nissa Begam* was to take the share to which she would be entitled as legitimate daughter, namely, eight-sixteenths, or one-half ; and that the remaining six-sixteenths were to be divided between *Mir Moinooddin Khan* and his brother *Mir Kamrooddin*, two distant relatives of the Nawab, who filled the character of residuaries according to Mahomedan law. It is, of course, impossible to go behind the finding of Mr. *Frere*, which was adopted and confirmed by the Governor in Council, and must be assumed to have determined once and for all the succession of *Afzaluddin*. *Bakhtiar-ul-Nissa Begam* died in 1845, in her mother's lifetime. *Amir-ul-Nissa* did not die until 1857, and it is conceded that, but for the question that has been raised in this suit, the Respondents, her two grand-daughters, would be her only ascertainable heirs.

Kamrooddin also died in the lifetime of *Amir-ul-Nissa Begam*.

In this state of things, and a good many years after the death of *Amir-ul-Nissa Begam*, the present suits were instituted by one *Fatma-ul-Nissa Begam*, who claimed to be the sister and heiress of *Moinooddin*, who, though he had survived *Amir-ul-Nissa Begam*, was then dead ; and the title put forward was that according to the law of Willa, which has been very ably and clearly expounded at the Bar, the person entitled to succeed and take the property of which *Amir-ul-Nissa Begam* died possessed, or to which she was entitled, was *Moinooddin*, as the male heir of *Afzaluddin*, who was the emancipator of *Amir-ul-Nissa Begam*, to the disherison of her own natural heirs.

A number of issues were settled in the suit, with many of which it is unnecessary to deal. The principal one, and that upon which both the Courts below have decided against the Plaintiff in the suit, and in favour of the Respondents, was that by Act V of 1843 this right, which was the foundation of the claim of *Moinooddin*, or of his representative *Fatma*, was taken away, and it is to that question that their Lordships propose on the present occasion to address themselves. In order to try that question they must, of course, assume that the status of *Amir-ul-Nissa Begam* was that which the Plaintiff represented it to have been, namely, that having been originally a *Rajpoot* girl who had been converted to Mahomedanism, she was brought into the zenana of the Nawab as his purchased slave ; that she was the mother, whilst still a

slave, of *Bakhtiar-ul-Nissa* by him ; and that on the day previous to the celebration of the nikah marriage, by which she became his wife, he had emancipated her. It must also be assumed, that the Willa rule of the Mahomedan law is such as Mr. Scoble has shewn it to be upon the authorities which he cited. The question now to be decided is, whether the Act in question prevents the application of that rule of law, and entitles those parties who but for it would have succeeded to their grandmother, as her natural heirs, to take the inheritance. Each of the Courts below has adopted a view of the operation of the Act favourable to the Respondents, though not precisely upon the same grounds. The Subordinate Judge says : " This Act was passed to declare and amend the law regarding the condition of slavery within the territories of the *East India Company* ; and sect. 3 runs as follows :—' No person who may have acquired property by his own industry or by inheritance shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person or that the person from whom the property may have been derived was a slave.' Now in the present case the Plaintiff alleges that had *Amir-ul-Nissa* been a free woman the Defendants would have been her heirs, but because she was a slave her property goes to her master's relatives. The section appears to me clearly to apply to such a contention." He then discusses Mr. Baillie's view of the effect of the statute, as expressed in Book IV of his Digest of Mahomedan Law, and refers to the absence of any discussion on the subject before Mr. Frere, when indeed the question had not arisen, and ends by saying : " I think then that the plea that *Amir-ul-Nissa*'s property must go to her husband's relations instead of to her own grand-children because though subsequently emancipated and married she was originally a slave is one which the Court cannot entertain, and that the claim is on this ground inadmissible."

The High Court say on this subject, " We think that Act V of 1843 deprived the Plaintiff of any right to bring this suit. *Amir-ul-Nissa* died in 1857 when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the Plaintiff

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rests solely upon the alleged fact that *Amir-ul-Nissa* had been at one time the slave of the late Nawab. He is said by the Plaintiff to have enfranchised *Amir-ul-Nissa*; and on the authority of 1 *Baillie's Digest*, 386, 387, and 3 *Hedaya*, 444, 445, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir would be her heir, and that neither her daughter nor the Defendants who are that daughter's daughters are so. That right, if it ever existed, is in our opinion one arising out of an alleged property of the late Nawab in *Amir-ul-Nissa*'s person and services before he enfranchised her, and as such is one of the rights which every Civil Court in *British India* is prohibited by sect. 2 of Act V of 1843 from enforcing. We are not prepared to say whether this case would not also come within the prohibition in sect. 3 of the same enactment."

The High Court then proceeded mainly upon the 2nd section, and the Subordinate Judge upon the 3rd section of the Act. In their Lordships' opinion both sections point to the conclusion that it was the general intention of the Legislature in passing this Act to relieve all persons then subject thereto from all the disabilities arising out of the status of slavery; and without saying whether the 2nd section of the Act is sufficient of itself to dispose of the claim in this suit, they have come to the conclusion that the 3rd section at least has that effect.

The section runs thus: "And it is hereby declared and enacted, that no person who may have acquired property by 'inheritance' shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person from whom the property may have been derived was a slave." Various arguments have been addressed to their Lordships as to the non-applicability of this enactment to the present case. It was first said that to apply it to this case would be to give a retrospective effect to the Act, in violation of the well-known rule of construction. Their Lordships cannot accede to that argument. The Act was in force at the time of the death of *Amir-ul-Nissa*; and the question who is entitled to succeed to her property is determinable by the law as it stood when the succession opened. Their Lordships cannot recognize any vested interest said to have been acquired previous

to the passing of the Act by the unascertained persons who might at her death be the then residuary heirs of her husband ; or admit that her husband, by the act of emancipation, acquired a vested right which the statute could not except by express and retrospective words take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the Willa rule of law is treated as having been in *Moinooddin* when *Amir-ul-Nissa* died. If he too had died in her lifetime, the right could not have been asserted by his sister and heiress, the Plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the Respondents cannot claim the benefit of the statute, inasmuch as they are not persons " who may have acquired property by inheritance," and that the words are to be construed by the Mahomedan law, which gives the property to a preferable class of heirs, viz., the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any persons who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery.

It was argued by Mr. *Doyne* that in all probability the Legislature had not its mind directed to this somewhat obscure branch of Mahomedan law, and that the section must be taken to apply only to cases in which the person from whom the property is inherited was at the time of his death a slave ; but if the third section were to be taken subject to the old Mahomedan law, the master in such a case would be entitled to take the property of the slave ; and the son of the slave, or the other natural heirs of the slave could not be said to be persons " who may have acquired property by inheritance." The clause upon this construction of it would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. *Doyne* that the operation of the statute or of this particular section in it is to be confined to the property of persons who at the time of their death were slaves. They are of opinion that in construing this remedial statute they ought to give to it the

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widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied, and falls within the language of the enactment. They find it impossible to say that this is not case in the present instance.

They have already intimated their opinion that the general scope and object of the statute was to remove all the disabilities arising out of the status of slavery. The rule of Willa whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator of the emancipated was not less such a disability, than the rule of law whereby the natural heirs of an unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the section has been already dealt with ; but a further argument has been founded upon the words "that the person from whom the property may be derived was a slave." The words are not "was a slave at the time of his or her death," and the term may well be taken to apply to any person who had at any time been a slave. Putting this interpretation upon the statute, their Lordships think that it is sufficient to dispose of this appeal without going into any of the other questions raised either of law or of fact, and they will therefore humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal with costs.

Solicitors for Appellants : *West, King, Adams & Co.*

Solicitors for Respondents : *Gregory, Rowcliffes & Rawle.*

RAJAH KISHENDATT RAM DEFENDANT ; J. C.*
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 RAJAH MUMTAZ ALI KHAN PLAINTIFF.
 ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

March 12,
13, 28.

Oudh—Usufructuary Mortgage—Purchase by Mortgage of Birt Tenures—Right of Mortgagor of Talook to redeem Birt Tenures within the Talook purchased by the Mortgagee.

In a suit (1870) to redeem a usufructuary mortgage, dated 1846, of a talookdari interest, with all its incidents, it appeared that most of the villages comprised therein were held by third persons under various birt tenures, valid and subsisting at the date of the mortgage, but that some of them were, in or before 1849, purchased by the mortgagee, who at the summary settlement after Lord Canning's proclamation was allowed to engage for all the villages, and to hold them as a talook, subject to rights of sub-settlement.

It appeared also, according to a settlement circular issued in *Oudh* on the 29th of January, 1861, that under the nuwabi, birt tenures were presumably carved out of the talookdar's estate ; that they were held under him upon terms varying according to the terms of the particular pattah or contract, and possibly according to the custom of a particular district ; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue ; that when such direct engagements took place, malkana was payable to the talookdar ; that they were sometimes resumable, and when resumed, would fall into the parent estate ; and that in all cases the relation of superior lord and tenant subsisted between the talookdar and the birtias ; but that birts still subsisting entitle their holders to sub-settlement under the *Oudh Sub-Settlement Act, 1866*.

It appeared also that the mortgagee, availing himself of his position as talookdar under the mortgage, had purchased the birts in question in this suit for an apparently inadequate sum, and had treated them as merged in the talook, engaging for them as talookdar and not as birtia, and taking no steps to keep them alive as distinct sub-tenures for his own benefit :—

Held, that, under the peculiar circumstances of the case, the mortgagor was entitled, according to equity and good conscience, and consistently with English law, upon paying the original mortgage money *plus* the purchase-money of the birts, to redeem the estate as now enjoyed by the mortgagee.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Feb. 9. 1875), which modified a decree of the Commissioner of *Fyzabad* (June 23, 1874), and varied a previous decree of the

*Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Judicial Commissioner (March 26, 1873), and decreed to the Respondent to right to redeem on certain conditions the mortgaged lands, the subject of the suit.

The principal question which arose on this appeal is whether a talookdar, who had mortgaged a portion of his talook and sued afterwards to redeem, is entitled in that suit not only to redeem on payment of the mortgage loan, the superior rights of a talookdar which he was possessed of at the time of the execution of the mortgage, but also to be put into possession on condition of repaying the actual purchase-money, of subordinate rights and tenures purchased by the mortgagee, while in possession from birtias or inferior zemindars, holding under the talookdar within the mortgaged talook.

The facts of the case are set out in the judgment of their Lordships.

The mortgage in question was executed on the 11th day of *Jeth Badi*, corresponding with the 22nd of May, 1846, and is as follows :—

" I Rajah *Umrao Ali Khan*, zemindar of *Ilaka Utraola*, do hereby make a legal declaration that whilst in the enjoyment of my good health and sound senses, I have of my own accord and free will mortgaged *Ilaka, Itwa, Khera Dih Nathipur Sehjora &c.*, thirty-five villages, one jote and land as per detail given below, together with trees producing, fruit or not, reservoirs, wells, tanks, mangoe groves trees of Mahwa, &c. with zemindary rights, such as produce of water and forest, inhabited lands and rights over subjects—including all the internal and external rights which have descended to me from my ancestors are up to the present moment solely in my possession and appertain to my zemindary, to *Pande Ramdatt Ram*, in consideration of Rs. 36,000 of the current coin, half of which is Rs. 18,000. I have received the said price in one lump from the mortgagee, and brought the same to my use. The conditions are, that the said Pande is allowed to take possession of the said villages and enter into engagement with Government for the payment of revenue.

" I shall have nothing to do with the profits of the estate or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum in one lump to the

Pande, in the month of *Baisakh*, when there are no crops standing on the ground. But should I claim redemption in another month within the year my claim should be regarded as fictitious and inadmissible by the Courts for the time being. If any one appears to lay claim to the said estate it will be my duty to defend the suit, with which the Pande shall have nothing to do. The above has therefore been executed as a mortgage deed, that it may serve as a document and be of use when required."

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On the 9th of February, 1875, the Judicial Commissioner delivered the judgment appealed from, the material portion of which is as follows :—

" I think there can be not doubt that the Commissioner is correct in saying that what passed to the Defendant under the mortgage was the full and unrestricted proprietary title in the estates covered by the deed of mortgage ; but at the same time the evidence appears to me to prove that the Defendant on entering on possession of the mortgaged estate, found himself hampered in the enjoyment of the full rights which would ordinarily have accrued to him under his mortgage by the existence of certain incumbrances in the shape of birts, and that in order to remove these restrictions he took measures to buy out the incumbrance holders. By so doing the Defendant undoubtedly improved the landlord's position, and the main question now for decision appears to me to be whether the Defendant is entitled to retain in subordination to Plaintiff the subordinate tenures which he has purchased, or whether the Plaintiff is entitled, with or without reimbursing the Defendant the amount expended by him in removing incumbrances, to re-enter on the estate in the same relative position as is now occupied by the Defendant. At the request of the vakils of the respective parties the further hearing of the case is adjourned for a fortnight that the point thus stated may be fully argued.—26th January, 1875.

" 9th February, 1875.—The vakil for Appellant admits that he has been unable to find any precedent by which the decision of this case can be governed. He refers to the principles of English law as laid down in *Story's Equity Jurisprudence* in regard to implied trusts, vol, ii, §§ 1237, 1238, and to the principle

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enunciated in the case of *Bright v. Boyd*, quoted in the same work, vol. i, § 388. It appears to me that this case may fairly be decided on the principle of the civil law, that any *bona fide* possessor, as, for instance, a creditor who has laid out money in preserving, repairing, or substantially improving an estate, should be allowed a privilege or lien for such meliorations: *Story's Equity Jurisprudence*, vol. ii, § 1239. This principle must at the same time be held subject to another, viz., that a mortgagee has no right to charge on the mortgagor the costs and expenses of unnecessary improvements, and should not be permitted to increase the value of an estate in such a way as to make it impossible for the mortgagor ever to redeem: see *Addison on Contracts*, 5th Ed., p. 260. In the present instance then, I find the facts to be that the Plaintiff mortgaged the estate of *Itwa Khera* for Rs. 36,000 to Defendant, and that by this mortgage he intended to convey to the Defendant whatever proprietary rights he then held in the estate. The Defendant on taking possession found himself hampered in the full and free enjoyment of the assets of the estate by the existence of certain incumbrances, and he therefore bought out some of the incumbrance holders. I consider this to have been under the circumstances a legitimate mode of increasing the value of the estate, and provided the expenditure incurred is not such as to render it impossible for the mortgagor to redeem, the mortgagee should in my opinion be allowed a lien for such meliorations. Accepting the facts found by Captain *Forbes*, it appears that the expenditure by Defendant in the purchase of birts has been Rs. 3,139. This cannot be held to be an exorbitant expenditure, and I think Plaintiff should reimburse the Defendant this amount or allow him to retain the birt rights which it is proved that he has purchased."

Leith, Q. C., and *Doyne*, for the Appellant, contended that the relief decreed to the Respondent should have been limited to the redemption of the interest which he possessed and was entitled to at the time of the mortgage in the mortgaged villages now remaining. The Respondent had no title to redeem the birt or other rights in any of the mortgaged villages, which rights he did not possess at the time of the mortgage, but which the Appellant

had thereafter acquired by his own outlay and exertion. In fact it was admitted for the Respondent in the Court below that under the terms of the mortgage all that he was entitled to redeem was the over-proprietary right in the mortgaged lands, which "meant all rights possessed by the Rajah of *Utraola*, exclusive of subordinate or under proprietary rights which existed at the time the mortgage was executed, and which had been subsequently purchased by the Defendant." It was contended on the evidence that the birtias had been for a long series of years the kabuliatdars, or direct engagers, for the revenue of their villages, and that, as found by the settlement officer, "they paid the amount of the government demand only, and enjoyed the whole of the surplus, the talookdar's title being little more than nominal, and his receipt confined to a 'Bhent' or species of tribute of a few rupees per village." The birt rights were consequently separable from the talookdari's rights, which alone formed the subject of the original mortgage; and that being so, their acquisition by the mortgagee should not be regarded as an improvement of the estate mortgaged, and the Appellant should have been declared entitled to retain them, after reconveying to the Respondent the mortgaged interest. Assuming, however, that the Respondent is entitled to a conveyance from the Appellant of the birt and other rights acquired by him, the measure of their value for purposes of calculating the redemption money should be, not the sums for which they were purchased by the mortgagee in 1849 or 1850, but their actual value at the date of suit.

Cowie, Q. C., and Graham, for the Respondent, contended that the decree of the Judicial Commissioner was right. As between the mortgagor and the mortgagee, the whole estate was mortgaged, and not merely certain rights therein. The Respondent was accordingly entitled to redeem the whole estate; and any purchase made by the Appellant whilst he was mortgagee and in possession of the advantages which accrued to him in that capacity was for the benefit of the estate and of the mortgagor, provided the latter were willing, on redeeming, to reimburse the mortgagee the purchase-money and expenses. It was against equity and good conscience, and against an ascertained rule of English law,

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J. C. to allow the mortgagee under such circumstances to retain the birt tenures as separate and distinct estates, and to hold them against the Respondent after he was willing to redeem. Reference was made to *Rakestraw Brewer* (1), *Pickering v. Vowles* (2), and *Keech v. Sandford* (3).

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Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd of May, 1846, Rajah *Umrao Ali Khan*, described as the Zemindar of *Ilaka Utraola* (the father of the Respondent), executed in favour of *Pande Ramdatt Ram* (who is now represented by his brother the Appellant) the instrument of mortgage which is set out above. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the villages specified in the schedule to it, redeemable on the repayment, at a certain season of the year, of Rs. 36,000, the principal sum secured; the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, *viz.*, *Panipur Mubarakpur*, have in some way ceased to belong to the estate; the others have, in the record, been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various birt tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the Rajah of *Utraola*. The resistance of the birtias seems to have been in a great measure successful; and it must now be taken to

have been found in the suit that the birts were valid and subsisting sub-tenures at the date of the mortgage ; and that the rights of the birtias in the different villages comprised in the 1st ; 3rd, 4th, and 6th of the seven classes or groups above referred to were purchased by the mortgagee some time in or before the year 1849. The birt right (if any) in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of *Oudh*.

At the summary settlement, posterior to Lord *Canning*'s proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thenceforward to have held them as a talook, subject of course to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

In December, 1870, and in the course of the regular settlement of the province, the Respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are what are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain *Forbes*, the settlement officer, in his proceeding of the 5th of November, 1873, found that at the time the mortgage deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called "bhent," and of certain market dues, to the occasional levy of a cess known as "sharakatana," and to a reversionary right in all lapsed birt estates, the title in which had been derived from the mortgagor's family ; that the taxes thus levied were of the nature of feudal or manorial tribute, and though necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the Rajah

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of *Utraola* was competent to convey, and all that was conveyed under the mortgage deed.

This proceeding being under a remand, Captain *Forbes* was not competent to determine the case judicially ; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem was the superior title as above described, subject to the birt interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th of June, 1874, decided that what was conveyed by the mortgage and was then redeemable by the mortgagor was, as between him and the mortgagee ; the full and unrestricted proprietary title in the estates covered by the deed of mortgage. He treated the acquisition of the birts by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This judgment was on appeal varied by the Judicial Commissioner, whose order of the 9th of February, 1875, was in the following terms :—

“The right of redeeming the mortgage on the estate of *Itwa Khera*, executed in 1253 Fusli by *Umrao Ali Khan*, ancestor of Plaintiff, in favour of Defendant, is decreed in favour of Plaintiff on payment of Rs.36,000, and if the Plaintiff at the time of redemption pays to Defendant the further sum of Rs.3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the Defendant, but if he fail to pay the further sum of Rs.3,139 at the time of redeeming the mortgage, Defendant will be entitled to retain the rights and interests of the birtia zemindars purchased by him in the estates of *Keera Dih*, *Bankata Ganesphur*, *Sanapar* and *Itwa*, and will retain these rights as an absolute under proprietary tenure in subordination to Plaintiff, paying to the Plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent.”

Against this order the present appeal is preferred. There is no cross appeal, and therefore the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase-

money of the birts, plus the original mortgage money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interest of the birtia zemindars purchased by him as an absolute under proprietary tenure in subordination to the talookdar, and to have a sub-settlement on that basis.

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult one.

The Appellant originally insisted that what was mortgaged was the mere right to receive a malikanah allowance; and he still insists that the mortgage must be taken to have been made subject to the birts: that those birts though held in some sense under the Rajah of *Utraola*, were distinct estates; that the Plaintiff is not entitled to redeem more than his ancestor mortgaged, and that the Appellant or his brother was notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the birts bought by him in his own right and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindary in lower *Bengal*, out of which a putree tenure has been granted, or one within the ambit of which there is an ancient mokurreree istimrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurreree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to mokurreree.

Their Lordships nevertheless have come to the conclusion,

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though not without some doubt and difficulty, that the decision of the Judicial Commissioner was in the peculiar circumstances of this case correct, and ought to be affirmed.

The first point to be considered is, what is the true construction of the original contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognised birts, for it contains no reference to them. On the face of it it is a mortgage of the ilaka or ilakas, consisting of the thirty-five villages, one piece of land, and one jote, "including all the internal and external rights which had descended to the mortgagor from his ancestors." And it is expressed to be upon the following conditions, viz. : "That the said Pande is allowed to take possession of the said villages, and enter into engagement with the Government for the payment of revenue. I (the mortgagor) shall have nothing to do with the profits of the estate, or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum (the Rs. 36,000) in one lump to the Pande in the month of Baisakh, when there are no crops standing on the ground." "If any one appears to lay claim to the said estate, it will be my duty to defend the suit, with which the Pande shall have nothing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemptions, was to be the zemindar *de facto* of the estate, with all the rights privileges and powers of a zemindar as between him and the sub-tenants; that he was to take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the Defendant that the Plaintiff had no other right than that of redeeming a malikanah allowance, and have held that the subject of the mortgage was the talookdary interest, with all its incidents, whatever that might include.

The next point to be considered is, what was the nature of the *bjrt* tenure, and what the relations between the birtias and the

superior zemindar. Upon this point their Lordships were referred by Mr. *Doyne* to the Settlement Circular of the 29th of January, 1861, being an official paper issued by the then Chief Commissioner of *Oudh* by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th, both inclusive.

The 18th says that birts were given for whole mauzahs, or patches of lands in mauzahs, and purposes in the first instance to deal with the latter. The 19th says, "These tenures, when granted by the talookdar for money received, will be maintained as representing the proprietary rights of the birtias, who by purchase have acquired the position of intermediate holders, and as constituting the portion of profits left them by the talookdar." And then, after distinguishing between birts given by talookdars and those given by mere thekedars, and treating the latter as not entitled to be maintained, it says, "Birts given by the original zemindars before the village was incorporated in the talookah will be upheld, unless the talookdars resumed them prior to 1262-63." The 21st paragraph says, "Birts of entire mauzahs are very common in *Gondah* and *Gorakpur*. They originated in purchases from needy talookdars, and sometimes in clearing leases of jungle and. In the *Utraula* and *Batui* pergunnahs of the *Gondah* districts, the birtias had been in many instances admitted to direct engagements with the Native Government for years previous to the annexation, and, of course, were settled with, and should have been so at the late summary settlement, on the principal that we are not bound to restore to the talookdars what they had lost before our rule commenced." The 22nd paragraph says, "In other instances the birtias held under the talookdar on the terms of their birt pattahs. These generally were, that 10 per cent. or dyhak, as it was called, on the amount of the pattahs, should be returned to them; that while they held on their pattahs the entire control of the village rested with them; and if they threw them up rather than accept enhanced terms, they were entitled to 10 per cent. on the collections. Sometimes the birtia's proprietary profits were shewn in holding a portion of the area 'nankar.'" The 23rd paragraph says, "In other instances the birtias had been

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stripped of every vestige of proprietary right, for embarrassed talookdars would sell the birt of a village several times over, and nothing was more common than to see several claimants to the birt of a village, each with his pattah in correct form." Paragraph 24 says, "Where the birtia has lost possession there is no more to be said. We are not to restore it to him, but the Cheif Commissioner is clearly of opinion that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pattahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars. It is no argument that the talookdar may not realize more than 10 per cent. above the Government demand. Such birt tenures must be considered an intermediate interest between the talookdar and the ryot, and, as such, entitled to be maintained." The 25th paragraph says, "The meaning of the term 'birt' is a 'cession.' It is the purchase of the proprietary rights subordinate to the talookdars on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power. In *Gorakhpore* the birtias were generally admitted to direct engagements, though charged with a malikhana of 20 per cent. to the talookdar. Here he must deal with the superior party."

The result of what has beem cited seems to be that, under the nuwabi, these birt tenures were presumably carved out of the talookdar's or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular pattah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place malikhana was payable to the talookdar; that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the birtias, a relation which, in an unsettled state of society like that of *Oudh* under the nuwabi, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the zemindar advantages which would not be possessed by a stranger. On the

other hand it is clear that birts still subsisting are tenures which would entitle their holders to sub-settlement under the *Oudh Sub-settlement Act* of 1866.

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the birts in question. To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 F. (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the birtias had in former years been allowed to engage for the particular villages comprised in their tenures, directly with the Government, and that he continued so, do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the birtias, including even those of *Itwa*, who are now said to have previously parted with all their birt interest.

It has also been proved that, immediately after the execution of the Mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talookdary title, and was only prevented from doing so by the resistance of the birtias, and the interposition, with or without jurisdiction, of the officer called the nazim. Here, then, the talookdar *de facto* was in open conflict with tenants of the estate claiming to be birtias. There is no proof of any regular trial and determination by a civil court of the disputed right. The nazim may have taken action merely as a matter of police, and to prevent disturbance. Then follow the purchases in 1256 F. and 1257 F., and the execution of the deeds by virtue of which the birtias, for very inconsiderable sums, conveyed their interests in the birts in question nominally to *Pande Ramdatt Ram*. There is, however, no evidence of the negotiations which led to these contracts; nothing which shews upon what basis they proceeded; how far, in making the purchases, the Pande was acting in the character and using the powers of talookdar, or how far in doing so he was compro-

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mising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talookdar were exerted to effect on favourable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talookdar holding under an absolute as distinguished from a mortgage title, the tenures would, as a matter of course, have merged in the talook. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shewn to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation he never sought to engage for these villages as birtia, and on the summary settlement after Lord *Canning*'s proclamation, he did in fact engage for them as talookdar, and as parcel of the talook. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he therefore not unnaturally dealt with the birts as merged in the talook, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases he would have resumed his position as talookdar, with the means of dealing on favourable terms with birtias who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talookdar *de facto*, has so acquired the birts and allowed them to merge in the talooka. To allow him now to revive these birts for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikana, and possibly rendering the talooka no longer worth redemption.

Their Lordships are therefore of opinion that the Judicial Commissioner had strong grounds for applying the principle, which he explains by his subsequent Minutes of the 26th of January and the 9th of February, 1875, he intended to affirm in his order of

remand of the 26th of March, 1873. In his final judgment he says that his intention in sending the case back to the Commissioner's Court was to ascertain whether the Defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the Plaintiff in respect of his expenditure on this account.

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There was some discussion at the Bar on the English decisions upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognise the general equity of the principle, and shew how it has been applied by the Courts of this country. It is therefore desirable shortly to notice the arguments on this point. It seems to their Lordships that although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby, the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw v. Brewer* (1) as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case which in its circumstances comes nearest to the present is that of *Doe v. Pott and others* (2), in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them.

J. C. It is difficult to see why, as in the case of a renewable lease, the
 1879 same equity should not attach to the mortgagee, particularly if
 — RAJAH by reason of his position as mortgagee in possession he has had
 KISHENDATT peculiar facilities for obtaining the surrenders. Some stress was
 RAM laid upon the case of *Shaw v. Bunny* (1), in which Lord *Romilly*,
 v. RAJAH Master of the Rolls, held that a second mortgagee was entitled,
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 — mortgage. An opinion to the same effect had previously been
 expressed by Vice-Chancellor *Kindersley* in *Parkinson v. Han-
 bury* (2), though he decided that case against the second mortgagee
 on the ground of his having had actual notice of an irregularity in
 the sale. These authorities, however, do not seem to their Lord-
 ships to touch the present case. The effect of a sale under a
 power of sale is to destroy the equity of redemption in the land,
 and to constitute the mortgagee exercising the power a trustee of
 the surplus proceeds, after satisfying his own charge, first for the
 subsequent incumbrancers, and ultimately for the mortgagor. The
 estate, if purchased by a stranger, passes, into his hands free from
 all the incumbrances. There seems to be no reason why the second
 mortgagee, who might certainly have bought the equity of re-
 demption from the mortgagor, should not, equally with a stranger,
 purchase the estate when sold under a power of sale created
 by the mortgagor. Upon the whole, then, their Lordships are of
 opinion that the decision of the Judicial Commissioner is equitable
 and correct, and they will humbly advise Her Majesty to affirm it,
 and to dismiss this appeal with costs.

Solicitors for the Appellant: *Young, Jackson, & Beard.*

Solicitors for the Respondent: *Watkins & Lattey.*

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THAKOOR JOWAHIR SINGH. RESPONDENT. Jan. 23, 24 ;
 March 1.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF
 SEETAPORE, OUDH.

Act 1 of 1869—Talookdar—Hindu Joint Family—Implied Trust.

In a suit brought (1865) by some members of a joint Hindu family for a declaration of right against another member thereof, it appeared that although the Defendant, being kabooliatdar of a certain talook in *Oudh* on behalf of the joint family, had obtained in his own name a sunnud thereof, and of certain villages granted by the Government as a reward for services rendered by the family during the mutiny, yet that from his acts and declarations he must be deemed to have consented to hold the same in trust for the joint family and as a joint estate, subject to the law of the *Mitakshara* :—

Held, that *Act I of 1869*, which was passed before the suit was decided by the Court of first instance, did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate. The estate in his hands remained thereafter subject to the trust, and there can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the Defendant.

IN this case the issue mentioned in the judgment printed below was referred by their Lordships on the 9th day of June, 1877, to be tried by the Commissioner of *Seetapore* (1). On the 13th of December, 1877, the Commissioner found that "there is no proof of any fresh act or agreement on the part of the Respondent, by which he became bound to hold the villages alluded to in the issue set in trust for the Appellant and *Parbut Singh*, but that they were an undivided Hindu family up to 1865, and that the joint interest extended to the whole estate then in possession, ancestral and acquired. I am bound, however, to say that the evidence shews that the acquired villages, other than the recovered

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ones, were the fruit of the energy and good management of the Respondent and his father, *Bhawani Singh*."

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Leith, Q. C., and C. W. Arathoon, for the Appellant.

Doyne, for the Respondent.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

When this case was before their Lordships on a former occasion it was remanded with a direction to the Commissioner to try or cause to be tried by the Settlement Officer the following issue, viz., Whether the Respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement or sunnud, or any and what part thereof, or of the rents and profits thereof, in trust for the Appellant and *Parbut Singh*, or either and which of them.

The Commissioner very properly took upon himself the trial of the issue, and correctly disposed of the several objections which were raised in the course of the investigation.

The nature of the present suit, the circumstances under which it was instituted, the effect of the decision of the Settlement Officer, and of that of the Commissioner from which this appeal was preferred, are fully stated in the reasons expressed by their Lordships in recommending a remand of the case for the trial of the above-mentioned issue. The case is reported in Law Rep. 4 Ind. App. 178.

In those reasons their Lordships stated that they were of opinion that, up to the time off Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the Appellant, the Respondent, and *Parbut Singh*, and that they were either ancestral or purchased with the proceeds of ancestral estate. Their Lordships also referred to the case of *Thakrain Sookroj Koowar v. The Government and others* (1), and also to the case of *Shunker Sahai v. Rajah Kashi Pershad*, decided in the Privy Council on the 29th of July, 1873, and since reported (2), as an authority for the proposition " that a person

(1) 14 Moore's Ind. App. Ca. 112.

(2) Law. Rep. 4 Ind. App. 198.

who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talukdari right, may, nevertheless, have made himself a trustee for another of the beneficial interest in the lands comprised within the talook, and be liable to account accordingly," and they remarked that the Lower Courts in the present case appeared to have decided the case merely upon the ground that the Defendant was protected by the sunnud, without adverting to sect. 15, Act I of 1869, or inquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the Plaintiffs or the Appellant had either *before* or after the passing of Act I of 1869 acquired or become entitled to a beneficial interest in any part of the property. They said that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question; that on the materials before them they did not feel competent to decide it, and that they had no evidence of the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or to the property comprised in it before the registration of the Defendant under Act I of 1869. The issue was accordingly directed, and there can be no doubt, and indeed it has not been disputed, that the evidence adduced upon the trial fully warranted the conclusion at which the Commissioner arrived, that the actual relation of the Appellant, the Respondent, and *Parbut Singh* remained that of a joint and undivided Hindu family from the date of Lord *Canning's* proclamation up to the quarrel and removal of the Respondent to *Kaswara* in 1865. The Commissioner also found, and in their Lordships' opinion correctly found, that the evidence proved that during that period there had been a joint interest in, and common management of, the property. Such an interest could not have existed unless the Defendant had consented that the villages should be held as the joint property of the family.

Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement to the effect that *Hurdeo Bux* was his partner, and with his deposition of the 8th of July, 1859, in which he stated that the custom prevailing in his family was that if his

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cousins, meaning the Plaintiff and *Parbut Singh*, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate subject to the law of the *Mitakshara*.

The suit was commenced long before the passing of Act I of 1869, viz., on the 28th of August, 1865, and it follows from what has just been said that, if judgment had been given before the passing of the Act, it ought to have been held that the Defendant was bound by the trust to be presumed as above mentioned. But in consequence of numerous delays and references, to which allusion has been made in the judgment of remand, the case was not decided by the Court of first instance until after the passing of the Act. It therefore became necessary to determine whether Act I of 1869 operated so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate.

Their Lordships are of opinion that it did not.

By the 3rd section it was enacted that every talukdar with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858, and the 10th day of October, 1859, or to whom, before the passing of the said Act, and subsequently to the 1st of April, 1858, a talukdari sunnud had been granted, should be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such talookdar when such settlement was made, subject to all the conditions affecting the talookdar contained in the orders passed by the Governor-General of *India* on the 10th and 19th days of October, 1859, and republished in the first schedule annexed to the said Act, and subject also to the conditions contained in the sunnud under which the estate was held.

The Commissioner very properly classified the villages in suit, and ruled that the issue directed was intended to apply to the whole of them.

The details are :—

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1st. Villages comprised in the summary settlement	78	1879
2nd. Villages granted in reward for services during the mutiny	20	THAKOOR HURDEO BUX
3rd. Villages acquired from the profits of the estate after summary settlement and before the institution of the suit	15	v. THAKOOR JOWAHIR SINGH.
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It should be remarked that the twenty villages granted for loyal services have since been demarcated into twelve.

The Defendant, as well as the villages Nos. 1 and 2 in the detail, fall within the category of sect. 3 of the Act.

That section, it should be observed, does not state that the talookdar shall be deemed to *have*, but that he shall be deemed to *have acquired* by the summary settlement and sunnud a permanent heritable and transferable right in the estate. The right so acquired was subject to the provisions of sects. 11 and 15 of the Act, by the latter of which it was enacted that if any talookdar should *theretofore have transferred* or should thereafter transfer the whole or any portion of his estate to a person not being a talookdar or grantee, and if such person would not have succeeded *according to the provisions of the Act* to the estate if the transferor had died without having made the transfer and intestate, the transfer of and succession to the property so transferred should be regulated by the rules which would have governed the transfer of such property if the transferee had bought the same from a person not being a talookdar.

If, therefore, the Defendant had, before the passing of Act I of 1869, and at any time after the date of the summary settlement and sunnud, and after he had thereby acquired the right which, according to the provisions of the 3rd section, he must be deemed to have acquired thereby, expressly declared that he held and would hold the estate in trust for the joint family as joint family estate governed by the rules of the Mitakshara, there can be no doubt that the estate would have been subject to the trust so

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declared, and that it would not have been converted by Act No. I of 1869 into an estate held by the Defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the Defendants.

Sects. 13 and 14 of the Act provide for certain formalities as regards gifts or transfers to be made by talookdars of estates acquired or held in the manner mentioned by sect. 3 of the Act; but no question can arise in the present case as to the effect of those sections, for it has been held that the formalities thereby required are not requisite to give validity to gifts or transfers executed by a talookdar before the passing of the Act: *Hurpurshad v. Sheo Dyal* (1).

Their Lordships have come to the conclusion that, under the circumstances of the case, there are no grounds for making any distinction as regards the rights of the parties between the seventy-eight villages included in the summary settlement and the twenty villages, now consolidated into twelve, which were granted by the sunnud for services during the mutiny, or those which were acquired from the profits of the estate. As regards those which were granted for services during the mutiny, the Plaintiffs *Hurdeo Bux* and *Parbut Singh* were doubtless as loyal as the Defendant *Jowahir Singh*, and rendered equally good services to the British Government. It is, however, stated by the Commissioner, and there seems to be no reason to doubt the correctness of his opinion, that he was fully convinced that the Government at the time they conferred the reward estate believed that they were conferring it on *Jowahir Singh*, the Respondent, alone. He says:—

“ I do not think they had any remembrance of the admission in the A Statement of the summary settlement, a document that would not be before them at the time, and the Respondent’s name appeared alone as proprietor. But if he gave loyal support to Government it was with the means of a talooka in which the Appellant and *Parbut Singh* had an actual, practical existing

common right at the time, and they had carried off the family and its effects to a place of safety, and returned in time to retake their fort, and at least quicken and molest the retreat of the rebel chief *Feroz Shah*, who was one of the sons of the King of *Delhi*, as deposed to by witnesses 8, 10, 11, and 12, for Appellant, and witness 2 for *Parbut Singh*. I do not think that if the whole facts had then been before the Government, it would not have given the reward to the brotherhood all the same. In this matter I think the Respondent was acting at the time as the representative of the family; and I do not see it anywhere shown that the common interest and the common management did not include these villages subsequent to their acquisition, and up to the rupture in 1865."

It appears from the evidence, as well as from the finding of the Commissioner that the Plaintiffs, *Hurdeo Bux* and *Parbut Singh*, were just as loyal as the Defendant *Jowahir Singh*, and rendered loyal services to Government equally as valuable as those which were rendered by him; that after the rebels had defeated the Defendant and he had retreated to *Lucknow*, *Hurdeo Bux* and *Parbut Singh* came to *Bassadeh*, drove the rebels away, and retook the fort; and that they also, with their followers, attacked the rebel *Feroz Shah*, one of the sons of the King of *Delhi*, after he had crossed the *Sarain*, took from him a gun, and hastened and molested his retreat.

These loyal acts, if not in the remembrance of the Government or of its officers, must have been known by the Defendant, and it must also have been known to him that the loyal services which he rendered to the Government were rendered by means of the then joint family property, and that in accepting the reward from Government he acted as the representative of the family. It may therefore reasonably be presumed that the knowledge of these facts induced him to treat the reward villages granted by the sunnud in the same manner as the ancestral villages which were the subject of the summary settlement, and accordingly it appears that from the time of the sunnud to the time of the quarrel in 1865, the reward villages, like all the others, were treated as part of the joint family estate, and were subject to the common

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management. This part of the case is similar in many respects to the case of *Hurpershad v. Sheo Dyal* (1), to which reference has already been made.

Upon the whole, then, their Lordships are of opinion that it is to be presumed from the acts and transactions of the Defendant that there was a declaration of trust by him in favour of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit were held by the Defendant in trust for the family, as a joint family estate, governed by the rules of the Mitakshara; and they rejoice to find that a loyal subject of the Crown, who rendered good service to the Government in the time of the rebellion, has not been deprived of all his property by the act of confiscation, and through the want of knowledge or the absence of remembrance on the part of the officers of Government of the moral claim which he had upon the Government for the restoration of his property.

The plaint does not allege that the plaintiffs have been dispossessed of their rights, but merely that the Defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that, after inquiry, proper orders may be passed that they be not deprived of their right.

Their Lordships must deal with the case as it stood at the time of the commencement of the suit.

At that time there does not appear to have been any complete separation or division of the family, and the Plaintiffs do not pray for a partition of the estate. *Hurdeo Bux* was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindu family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal and to reverse the judgments and decrees of both the Lower Courts, and to declare that the Defendant holds the villages in suit in trust for the joint family, and as a joint family estate, governed by the rules of the Mitakshara, and to order and decree that the Defendant do cause and allow the said villages, and the proceeds thereof, to be managed, used, dealt with, and applied accordingly; and that he do pay the costs of

the Plaintiff *Hurdeo Bux* in both the Lower Courts out of the estate.

Further, their Lordships do order that the costs of the plaintiff, *Hurdeo Bux*, in this appeal be paid by the Respondent out of the estate.

A question has been raised on the argument of this appeal, whether, by reason of an arrangement alleged to have been entered into by *Hurdeo Bux* and *Parbut Singh*, pending the suit, the latter is entitled to the benefit of this appeal or the former to recover *Parbut Singh*'s share as well as his own.

It was also suggested that *Parbut Singh* had, after the arrangement with *Hurdeo Bux*, entered into an arrangement with the Defendant.

Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit subsequent to the commencement thereof.

Agent for the Appellant : *T. L. Wilson.*

Agent for the Respondent : *F. Barrow.*

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May 7, 8. THE COLLECTOR OF MADURA PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Registration—Act XX of 1866, s. 17—Madras Act VII of 1865, s. 3—
Puttah—Lease.*

A document professing to be a lease, but unregistered, was granted by a zemindar to the Defendant's father, its terms being "In consideration of the assistance you have rendered to the zemindary, you requested that village *A.* should be leased to you for forty years, fixing a favourable poruppu. The said village," found to be value of Rs. 1,700 per annum, "has been accordingly leased to you for forty years at Rs. 400 per annum. You shall therefore raise the required crop and enjoy ; and agreeably to the kararnama you have given, you should continue to pay the fixed poruppu according to the instalments of kist year after year" :—

Held, that this document is not a puttah within sect. 3 of *Madras Act VIII* of 1865, and not being excluded from the operation of *Act XX* of 1866, sect. 17, was inadmissible in evidence and did not affect the estate.

Sect. 3 was not intended to apply to all cases of persons holding under others, but directs that where there is an existing relation of landlord and tenant, the landlord shall in that case grant a puttah to his tenant.

APPEAL from a decree of the High Court (Jan. 5, 1877),
affirming a decree of the Judge of Madura (May 30, 1876).

The facts of the case and nature of the suit appear in the judgment of their Lordships.

The previous history of the case, and the decision of the Privy Council of the former litigation respecting the succession to the zemindary of *Ramnud*, will be found in 12 *Moore's Ind. App.*, p. 396.

Mayne, for the Appellant, contended that the lease or puttah of 1867 was valid and binding, either originally or by way of confirmation. Though unregistered, it is admissible in evidence, because it is not one of the documents which falls within Act XX of 1866 : see sect. 17 and interpretation clause ("lease") of that

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Act. It is a puttah within the meaning of *Madras Act VIII* of 1865, sect. 3 : *Vikaty Ramareddy v. Duvvura Ayappareddy* (1). Reference was made to sect. 11 (last clause), and to Regulation XXV of 1802, sect. 15, and Regulation IV of 1822. The case of *Muttu Viran Chetty v. Rani Kattama Natchiyar* (2) shews that there is no statutory rule against the successor to the zemindary being bound by the lease. The zemindar may alienate his ancestral property, of which he was at the time absolute owner, so as to bind his after-born son.

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Cowie, Q.C., and *Graham*, for the Respondent, contended that the document in question did not fall within sect. 3 of *Madras Act VIII* of 1865, and therefore required registration, and that being unregistered, was inadmissible in evidence. Further than that, under sect. 49 of Act XX of 1866, the lease was not merely inadmissible ; it was a mere nullity. Even if the lease came within sect. 3 of the *Madras Act*, as contended, though in that case good as against the zemindar, it was not binding as against his successor ; see sect. 11, proviso.

Mayne replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

This was a suit brought by the Collector of *Madura*, acting for the Court of Wards, on behalf of the minor zemindar of *Ramnad*, against the Defendant, to recover possession of the village of *Selugai*, and also to set aside a lease of that village granted by the late zemindar of *Ramnad*, the minor's father, in the year 1870. The learned counsel on the part of the Appellant, the Defendant below, has not sought to impeach the judgments of the Courts below so far as they set aside the lease of 1870, but his contention has been directed to establish a former puttah which had been granted by the late zemindar to the Appellant's father in the year 1867. It does not appear that the question which has been argued at the Bar was the subject of decision in the High Court. The judgment of the District Judge of *Madura*

(1) 7 Madras H. C. R. 234.

(2) 4 Madras H. C. R. 463.

J. C. proceeded upon the footing that the document of 1867 was inadmissible in evidence. It is an unregistered document made before the birth of the present Plaintiff. The District Judge also held that the lease of 1870, which was registered, did not bind the minor Plaintiff, inasmuch as it was granted after his birth, and upon considerations which did not support it against his inchoate title. Their Lordships feel regret and some surprise that the Judges of the High Court have given no reasons for their judgment ; none have been reported to their Lordships.

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The sole question which is now before their Lordships is whether the document of 1867, in consequence of its not having been registered, is admissible in evidence and affects the estate ; the point for decision being whether it is a document that falls within the General Registration Act, No. XX of 1866.

The argument having turned entirely upon the effect of this Registration Act, which refers to a *Madras* Act, and upon the construction of those two Acts as applicable to the instrument, it is unnecessary to go into the previous history of the case. It is sufficient to say that the late zemindar of *Ramnad* was adopted by the widow of a former zemindar ; that his adoption was disputed, and great litigation was the consequence of that dispute. The case ultimately came before this tribunal upon appeal, and a decision was given, in May, 1868, in favour of the adoption. Considerable expenses were necessarily incurred, and the Defendant's father, *Arunachellam Chettiar*, and his partners, who appear to have been merchants and bankers, made very large advances to the zemindar and his agents for carrying on the legal proceedings. In 1867, when the document in question was granted, the advances amounted to about a lac and a half of rupees ; and at the end of the litigation the further advances and accumulated interest amounted to very nearly four lacs of rupees. The merchants who advanced the money took security for their advances, and in the end they received the whole of their money with compound interest, and several large sums by way presents in addition to the interest.

The document on which the question arises is dated the 15th of April, 1867, and professes to be a lease from the late zemindar to *Arunachellam Chettiar*. Its terms are these : " In consideration of

the assistance you have rendered to this samastanam (zemindary), you requested that the kasba (chief) village of *Selugai*, in *Selugai* division in *Rajah-Singamangalam Firka*, should be leased to you for forty years, fixing a favourable poruppu." "The aforesaid *Selugai* village"—describing it—"has been accordingly leased to you for forty years from this Fusli 1276 up to Fusli 1315, fixing the poruppu at Rs.400 per annum." It may be stated, in passing, that it is found that the value of this village was Rs.1,700 per annum, so that it was obviously a favourable, lease, which was intended to confer a valuable interest on the lessee. "You shall, therefore, raise the required crop and enjoy ; and, agreeably to the kararnama (agreement) you have given, you shall continue to pay the fixed poruppu according to the instalments of kist year after year."

This lease was not registered. It is the document upon which the Defendant now relies to resist the claim to possession of the village made on the part of the minor zemindar ; for, as has been already stated, it is not now contended that the judgments below with regard to the lease of 1870 can be impeached.

It is necessary to refer shortly to Act No. XX of 1866, though the main question arises upon the *Madras Act* VIII of 1865, to which reference is made in it. By the 17th section of Act No. XX "leases of immoveable property for any term exceeding one year" are required to be registered. The interpretation clause (clause 2) says of the word "lease," " 'Lease' includes a counterpart, a kabulyat, an undertaking to cultivate or occupy, and an agreement to lease, but not a puttah or muchilika as respectively defined in sect. 3 of Act No. VIII, of 1865, of the Governor of *Fort St. George* in Council executed in the *Madras* Presidency." It is contended on the part of the Defendant that this document is a puttah as defined in sect. 3 of this Act.

The preamble of the *Madras Act* is as follows : "Whereas it is expedient to consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent." Sect. 3 seems to be confined to the relation of tenants who are cultivating the land, and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be, by sect. 3 and the

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sections which specifically refer to it, to regulate the relation of landlords and tenants of that description. This 3rd section, which is the one under which this document must be brought, if it is to escape the obligation of registration, is as follows: "Zemindars, shrotriemdars, inamdars, and persons farming lands from the above persons, or farming the land revenue under Government, shall enter into written agreements with their tenants, the engagements of the landholders being termed puttah, and those of the tenants being termed muchilika." It is said that this description embraces all cases where there is a landlord and a tenant. If that were the construction of the 3rd section as applied to the *Registration Act*, the consequence would be that in *Madras* all leases would be excluded from the beneficial operation of that Act. However large the premiums that may have been given on such leases, however small the rent, if there be a rent at all, according to the contention on the part of the Appellant, the lease would fall within this 3rd section, and therefore need not be registered. One class of those who are described as landlords as distinguished from tenants are persons farming lands from zemindars and others who are previously mentioned; but if the wide construction were to prevail, every lease from a zemindar to any such person intermediate between the zemindar and the ryots, would be a lease which need not be registered; and the mischief against which the *Registration Act* was intended to provide a remedy would exist in the case of all the valuable leases which are granted by zemindars to intermediate holders.

The reference in the *Registration Act* is to a "puttah or muchilika as respectively defined in sect. 3." This section of the *Madras Act* does not strictly contain a definition, but a description only. It appears to provide for what shall be done where there is an existing relation of landlord and tenant, and requires that the landlord shall in that case enter into a written engagement with his tenant. Following the provisions of the Act, the remedies which are given in sects. 8 and 9 can only be available where the relation of landlord and tenant, or a holding of some sort, already subsists, upon the basis of which the landlord or the tenant, as the case may be, may come into Court and claim to have a lease granted. Sect. 8 is, "When any of the landholders specified in sect. 3 shall for

three months after demand refuse to grant such a puttah as his tenant was entitled to receive, it shall be lawful for the latter to proceed by filing a summary suit before the collector, who shall try the case and direct a proper puttah to be granted." Under sect. 9, the landlord may in like manner compel the tenant to accept a proper "puttah. These provisions are made upon the assumption that there is an existing relation which would warrant the application by either party for a written puttah. It cannot, of course, be contended that in this case the zemindar was bound to grant the lease of 1867, or any lease to *Arunachellum Chetti*. The other provisions of the Act are consistent with this construction of sect. 3, Sects. 5, 10, 11, and 12, refer specifically to the class of landlords described in sect. 3 ; whilst sect. 13 refers to other classes, shewing that sect. 3 was not intended to apply to all cases of persons holding under others, but to a particular class of landlords and tenants only.

A further question was raised in the first instance before the District Judge, viz., whether, supposing the document of 1867 to be a puttah within the meaning of the *Madras Act VIII* of 1865, the proviso which is found at the end of sect. 11 would not nullify its effect as regards the Respondent, the "successor" of the grantor ? There seems to be ground for the contention that this proviso is not limited to cases where suits are brought under the 8th, 9th, and 10th sections, although the commencement of the 11th section refers to such suits. The commencement is : " In the decision of suits involving disputes regarding rates of rent which may be brought before collectors under sects. 8, 9, and 10. the following rules shall be observed," and then come four rules. Three of them appear to apply to such suits, but it may be doubtful whether clause 4, which relates to waste lands, is so confined. Then the proviso referred to is, " Provided also, no puttahs which may have been granted by any such landholder at rates lower than the rates payable upon such lands, or upon neighbouring lands of similar quality and description, shall be binding upon his successor, unless such puttah shall have been *bona fide* granted for the erection of dwelling-houses, factories, or other permanent buildings, or for the other purposes mentioned in the proviso." It is difficult to suppose that the operation of this proviso was

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J. C. intended to be confined to cases in which suits are brought under
 1879 sects. 8 or 9 ; and it may be that it was intended to apply to all
 RAMASAWMI puttahs which come within the 3rd section. If so, the Appellant,
 CHETTI assuming the Respondent to be a successor within the meaning of
 THE the proviso, would be placed in the difficulty which induced his
 COLLECTOR advocates at the first hearing before the District Judge at *Madura*
 OF MADURA. — to take the opposite view from that which his counsel has taken
 to-day, and to contend that this document was not a puttah within
 the meanig of the *Madras Act*, a view which was upheld by the
 Judge. It is not however necessary to decide this point.

On the whole therefore their Lordships are of opinion that this appeal fails, and they will humbly advise Her Majesty to affirm the decrees of the Court below, with costs.

Solicitors for the Appellant : *Gregory, Rowcliffes, & Rawle.*

Solicitor for the Respondent : *H. Measure, India Office.*

CHIDAMBARAM CHETTIAR AND OTHERS . DEFENDANTS ; J. C.*

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GOURI NACHIAR PLAINTIFF. May 27.

AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Partition—Inheritance.

In a partition suit the judgment found that the estate was partible, and that the Plaintiff was entitled to a moiety thereof subject to such charges as might thereafter be found to be binding. Whether or not a decree was framed the judgment was treated in the subsequent proceedings as equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties :—

Held, that this amounted to a partition, and that on the death of the Plaintiff his share passed to his own representatives in the course of succession to separate estate and not by survivorship to his co-sharers.

APPEAL from a decree of the High Court (March 19, 1875), which modified its former decree (Jan. 5, 1874), and substantially affirmed a decree of the Court of *Madura* (April 2, 1872).

The facts are stated in the judgment of their Lordships.

Cowie, Q. C., and *Mayne*, for the Appellants.

Leith, Q. C., and *Bowring*, for the Respondent.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

This appeal arises out of a suit brought by the younger son of one *Gouri Vallabha Tevar*, the late zemindar of a dependent zemindary carved out of the great *Sivaganga* estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the zemindary under titles derived from either the father or the elder brother of the Plaintiff. The general nature

* Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. of the suit was for a partition between the brothers, and for the
 1879 recovery of the Plaintiff's share freed from the interests claimed
 CHIDAMBARA by the other Defendants, except to the extent to which the aliena-
 RAM tions were valid against him under Hindu law. The litigation
 CHETTIAR has now been reduced to the question whether and upon what
 v. terms the Plaintiff's representatives are entitled to recover his
 GOURI moiety of the village *Pattanam* from the third Defendant *Rama-*
 NACHIAR. *sami Chetti*, and his moiety of the village *Minnittangudi* from the
 — fourth Defendant *Ramanadhan Chetti*. These two Defendants are
 the present Appellants.

The facts were very clearly and candidly stated by Mr. Cowie in his opening, and it is unnecessary to recapitulate them, because it is admitted that the decree impeached must stand, unless the Appellants can succeed upon one ground. That ground is, that the Plaintiff having died on the 23th of March, 1872, without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to effect that severance of interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question : In August 1871, the first of the issues settled in the cause, viz., "whether the property sued for constituted a zemindary, and if so, whether it is partible or impartible, and whether it is liable to all the incidents of private property," was tried separately, and was determined by the civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause and disposed of them by his judgment and decree of the 2nd of April, 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd of April of that year. On that petition the Judge made the following order : "The case has been heard ; oral judgment pronounced at the close of the hearing except in regard to details ; and this day the Court delivered its written judgment ; petition dismissed." The present Appellants appealed against the decree of the 2nd of April, 1872, and the second of their grounds of appeal is the following : "The Plaintiff died after the suit was

brought, but before the decree was written or signed or judgment delivered, and that under these circumstances the suit ought to have been dismissed, as no partition could be made."

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On the 6th of January, 1873, the High Court, before disposing of the appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the Plaintiff died, and when it became so; and also another issue. In his finding upon the first issue dated the 14th of April, 1873, the Judge said, "I am of opinion that the partition was complete, *i.e.*, that the brothers became divided in interest, at least on the 24th of August, 1871, if not before. I regard that order as equivalent to a decree for dissolution of partnership and for an account. The shares were ascertained, and all that remained to be done was to see what charges, if any, on any particular properties, were good as against Plaintiff. This was a question between the Plaintiff and the alienees alone, and first Defendant had nothing to do with it." The present Appellants appealed against that finding, but the High Court in its judgment of the 5th of January, 1874, expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that in the month of February, 1872, and before the written judgment of the 2nd of April of that year was delivered, there had been an oral judgment which would have effected a partition, or at least a severance of interest between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th of August, 1871, on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear that the estate was in its nature partible, that the facts were incontestable, and stated that the Defendant's vakils had given in their adhesion to the finding of the Court upon that issue. The judgment then proceeded as follows: "That being so, it is also not disputed that Plaintiff is entitled to a moiety of the property left by his father at his death, whatever that moiety may be, subject to all charges then subsisting, and to such charges as have been incurred subsequently, as are of such a character as are recognised under Hindu law to be valid charges upon the estate, but to enable the Court

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to arrive at a correct conclusion it is necessary to appoint a Commissioner with power to investigate the accounts, and the result will be submitted for the Court's consideration." It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the Defendants, other than the Plaintiff's brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgage property. It then adds, "In accordance with these observations an order will be prepared." No formal order or decree drawn up upon that judgment is to be found in the Record, but their Lordships are by no means satisfied that there may not have been one. At all events they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think appears from the 11th and 19th paragraphs of the judgment of the 2nd of April, 1872. In the former he says, "The Court in its proceedings of the 24th of August, 1871, held that the estate in question was partible and subject to all the incidents annexed to property among Hindus, and that the Plaintiff was entitled to a moiety of the property left by his father at his death, whatever that moiety might be, subject to all charges then subsisting and to such charges as have been incurred subsequently as are of such a character as are recognised under Hindu law to be valid charges upon the estate." In paragraph 19 he says, "This suit has now come before me in another form, and the points I have to determine are the conditions under which Plaintiff is entitled to recover a moiety of his ancestral property." He does not in any part of this judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the Plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be

observed that there was no appeal against the judgment of the 24th of August, 1871, or its finding on the first issue ; and that the first Defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th of August, 1871, must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier v. Rama Subba Aiyan* (1), and there is no ground for the condition that upon the death of the Plaintiff his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree under appeal and to dismiss this appeal with costs.

Solicitors for the Appellant : *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondent : *Talbot & Tasker.*

(1) 11 Moore's Ind. App. Ca. 75.

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—

J. C.* ASHUTOSH DUTT , - DEFENDANT ;
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 May 28 ; DOORG A CHURN CHATTERJEE AND } PLAINTIFFS.
 July 26. ANOTHER

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Will—Construction—Inconsistent Condition.

A Hindu testatrix, after creating a charge upon the property, the subject of her will, for the expenses of various religious acts and ceremonies, directed that "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported there from ;" and, further, that "this property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale " :—

Held, that the former direction amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, the share of each member being capable of being ascertained and of being attached in execution by his creditors ; and that the latter directions, being inconsistent with the interest given, were wholly beyond the testatrix's power, and must be rejected as having no operation.

APPEAL from a decree of the High Court (Dec. 5, 1876), affirming a decree of the Subordinate Judge of *Hooghly* (Aug. 6, 1875), which set aside an order of the Judge of *Hooghly*, dated the 24th of September, 1874, and released the property in suit from attachment, declaring it to be *dewuttur* property.

The suit was instituted by the Respondents, as sebaits of a family idol, to prevent, under the circumstances stated in their Lordships' judgment, an order for execution of a decree obtained by the Appellant against *Doorga Churn Chatterjee* being carried out by the sale of his interest in a certain talook called *Panchgatchia*, on the ground that he was interested therein only as sebait of the idol, and that there was no personal or beneficial interest of his which could be legally sold.

The judgment appealed from (*Garth*, C.J., and *Morris*, J.) is as follows :—

" We think that in this case the decision of the Court below

* Present :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

must be affirmed, and that there is no ground for modifying either the judgment or the decree.

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"We have no doubt that the will made by *Srimati Saraswati Debi* is valid disposition of her property; and that the effect of it was to create an endowment substantially for religious uses. That being so, it is clear that the attachment issued against a share of this property, at the instance of the execution creditor, and the order made by the Judge of *Hooghly* that the execution should proceed, ought both to be set aside; and it is impossible to say that the subordinate Judge was wrong in confirming the will and declaring the subject of it to be dewuttur property. It may be that under that clause of the instrument which disposes of the surplus proceeds of the estate the shansar, or members of the family of the establishment, may hereafter become entitled to some beneficial interest in such surplus; but this interest is of such a fluctuating and uncertain character that it could never form the subject of attachment or sale.

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"The appeal will be dismissed, with costs."

Leith, Q.C., and *Doyne*, for the appellant, contended that the personal and beneficial interest of the Respondent in the talook in suit was, under the *Civil Procedure Code*, liable to be attached and sold. [SIR BARNES PEACOCK:—Under what section could you sell, and what would you sell?] The Respondent's interest in the immovable property. Assuming that the object and effect of *Saraswati's* will was to create an endowment substantially for religious uses, the Respondent was nevertheless possessed of the talook, not only as sebait for those uses, but also on his own account. His interest therein could be sold, just as the interest of a member of a joint family in the joint estate could be sold. [Sir BARNES PEACOCK:—But what would the purchaser get? Could he go and live in the family house and ask to be supported out of the surplus?] He would be entitled to a share of the proceeds of the talook. There is a beneficial interest liable to be seized. [SIR BARNES PEACOCK:—Could you sell a widow's right of maintenance?] No; but if specific lands be charged with maintenance, the interest of the beneficiary therein may be sold. [SIR BARNES PEACOCK:—Here the will provides that the beneficiaries

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are to be maintained, but are to have no interest. What right had the beneficiary himself?] Upon the evidence the alleged endowment was a mere device whereby *Saraswati Debi* intended to bequeath the talook to her sons and the family for their own use and benefit, without liability to the satisfaction of their debts ; and that the law will not allow. Then the surplus profits were applied to *Doorga Churn*'s private use ; at least the Respondents, on whom the burden lay, have not proved the contrary. There was a trust of the surplus, or part thereof, for his use. This beneficial interest was seizable : see Act VIII of 1859, sects. 235, 249, 259, 260.

The Respondents did not appear.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The principal question to be determined in this appeal is, whether or not the Respondent, *Doorga Churn Chatterjee* had any right, title, or interest in a certain talook called *Lot Panchgatchia*, in Zillah *Hooghly*, liable to be attached and sold in execution of a money decree against him. The question arose in this manner. The appellant sued him in the High Court, Original Jurisdiction, and on the 16th of November, 1864, obtained a decree against him for Rs. 3,500, with interest and costs. In execution of that decree an attachment was issued. The attachment is not on the record, but it appears from the plaint that under it a one-third share of the talook was attached, and thereupon *Doorga Churn* (the debtor) and his brother *Shama Churn*, who are the Respondents in this appeal, intervened and put in a claim to the property, alleging that it was not liable to attachment, inasmuch as they held it in trust for an idol, *Raj Rajeswar*, by virtue of a will executed by their mother *Saraswati*. The Judge of *Hooghly* having investigated the claim, distrusted the genuineness and *bona fides* of the will, he stated that he did not believe that the property was held in trust for the idol, and, under the provisions of sect. 246 of Act VIII of 1859; disallowed the claim of the Respondents, and ordered the execution to proceed. The present suit was consequently brought by the Respondents against the

Appellant under the same section to set aside the order of the Judge, and prayed that the will executed by their late mother should be confirmed, that the share of the talook which had been attached and ordered to be sold should be declared dewuttur property, or property dedicated to religious uses, and not liable to be attached or sold for a private debt of *Doorga Churn*.

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A written statement was put in on behalf of the Defendant, and several issues were raised, and amongst them the third, fourth, and fifth, which were the material ones on the merits. The third was, whether the will set up by the Plaintiffs was a genuine document, and whether the mother, *Saraswati*, endowed the property in suit for the sole benefit of the idol, and whether the profits of the disputed estate had been appropriated to the idol alone. Fourth, whether the Plaintiffs were entitled to a declaration that the estate was not liable to be attached and sold in execution of the decree obtained against one of them personally. Fifth whether the Plaintiffs were the beneficial owners of the property. The Subordinate Judge found in substance that the will was genuine, that it was not colourable or fraudulent, and that it was intended to be acted upon, and thereupon he held that the property was dewuttur, and not liable to be attached or sold for a private debt, and ordered it to be released from attachment. Each party was ordered to bear his own costs.

Upon appeal to the High Court it was contended that the Lower Court was wrong in finding that the will was a *bona fide* instrument, and that the Court ought to have found upon the evidence on the record and the probabilities of the case that the will did not create a *bona fide* endowment, but was a mere device to secure the property from sale in execution a decree; that the endowment to the household idol was a mere colourable device to give a show of legality to a transaction which was in reality a perpetuity and to preserve the property in the hands of the family, and that, as such, it was void and illegal.

Further, it was contended that under any view of the nature and effect of the will the debtor, *Doorga Churn*, had a considerable beneficial interest in the property.

The High Court affirmed the decision of the Lower Court. They said: "We have no doubt that the will made by *Srimati*

J. C. *Saraswati Debi* is a valid disposition of her property, and that the
 1879 effect of it was to create an endowment substantially for religious
 uses. That being so it is clear that the attachment issued against
 ASHUTOSH a share of this property at the instance of the execution creditor,
 DUTT and the order made by the Judge of *Hooghly* that the execution
 v. should proceed, ought both to be set aside ; and it is impossible
 DOORGA to say that the Subordinate Judge was wrong in confirming the
 CHURN will, and declaring the subject of it to be *dewuttur* property. It
 CHATTER- may be that, under that clause of the instrument which disposes
 JEE. of the surplus proceeds of the estate, the 'shansar,' or members
 of the family establishment, may hereafter become entitled to
 some beneficial interest in such surplus ; but this interest is of
 such a fluctuating and uncertain character that it could never
 form the subject of attachment or sale."

The Lower Court having found that the will was genuine and *bona fide*, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bona fide* intended to operate ; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following :—

" This will is executed by *Srimati Saraswati Debi*. I am always sick ; hence I execute this will to the following effect :—I dedicate the auction-purchased property, No. 3496, *Lot Panchgatchia*, Pergunnah *Baligori*, Zillah *Hooghly*, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed, from the proceeds of the said property if there be a surplus in the profits then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son *Doorga Churn Chuttopadhyaya* and the second son *Sama Churn Chuttopadhyaya* to be the executors of this will. When my youngest son *Bhogobati Churn Chuttopadhyaya*, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes,

charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges ; and will defray from the aforesaid profits the expenses of the daily worship of the said Thakur, the expenses of the *parbans*, i.e., the *Dole-jattra*, the *Rashjattra*, &c. on his account, [the expenses of] the *Doorga Pooja*, the *Shama Pooja*, and the *Jagadhatri Pooja*, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate. And from the proceeds thereof you will meet the expenses described above ; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death, he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb* and the ceremonies and *poojas*, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts. To this effect, of my own accord and in full possession of my senses, I execute this will. The 2nd of Cheyt, 1274.

“ *Saraswati Debi.* ”

According to the construction which their Lordships put upon the will, it cannot be said that the property was wholly dewuttur. They consider that it created a charge upon the property for the expenses of the daily worship of the idol, as it was performed at the time of the death of the testatrix, and of the *poojas*, *shradhs*, and religious ceremonies for which provision is made by the will. For the purpose of this decision the charge may be termed generally a charge for such religious acts and ceremonies. So far the case falls within the class of which that of *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (1) may be referred to as an example.

The next question that arises is, who are entitled to the beneficial interest in the talook, subject to the religious and ceremonial trust. The testatrix has certainly attempted to dispose of this,

(1) 8 Moore's Ind. App. Ca. 66.

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—

and, if she has done so effectually, it cannot be held, as has been held in some cases, to have passed to her sons in their character of heirs-at-law as property undisposed of. Her disposition is contained in the words, "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom."

Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further declares "this property of mine will not be liable for the debts of any person. None will be able to transfer it, none will have the rights of gift and sale." But these directions, being inconsistent with the interest given, were wholly beyond her power, and must be rejected as having no operation. This being so, it follows that *Doorga Churn* took a share of the property in question, which, after satisfying the expenses actually incurred in the worship of the idol, cannot be assumed to be valueless, and might be considerable, and which, in their Lordships' opinion, was subject to be taken in execution by his creditor. Inasmuch as their Lordships are not precisely informed of the state of the family on the death of the testatrix, they are unable to specify what that share was, and there being no *constat* as to what is required for the performance of the religious trust, the interest acquired by a purchaser at any such execution sale would have to be ascertained and realised in some other further proceeding. In these circumstances, their Lordships are of opinion that the attachment should be allowed to stand; but that the summary order of the Judge of *Hooghly*, which would apparently authorize the sale of one-third of the talook, as if unaffected by the will of the testatrix, is erroneous, and should be set aside.

They will therefore humbly advise Her Majesty that the decrees of both the Lower Courts be reversed. That it be declared that the will of *Saraswati* was a genuine will and *bona fide* intended to operate, and that the effect of the will was to charge the property in the hands of the executors thereby appointed with the payment of such sums as might be necessary to defray the expenses which might from time to time be incurred in the daily worship of the

idol therein mentioned, in the manner in which such service was performed at the time of the death of the testatrix, and with the expenses of the parbans and of the poojas and other religious acts and ceremonies in the said will mentioned ; that, after defraying such expenses, the surplus belonged to the members of the joint family, of whom *Doorga Churn* was one, and that his interest in the talook under the said will was liable to be attached and sold in execution of the decree of the High Court of the 16th of November, 1864 ; and to order that the summary order of the Judge of *Hooghly* be set aside, but that the Appellant be at liberty to proceed to a sale in execution of the right, to title, and interest of *Doorga Churn* in the said talook under the said will, and that each party do bear their own costs of the suit in both the Courts below.

The Appellant having failed in his attempt to impeach the genuineness and *bona fides* of the will, their Lordships are of opinion that he is not entitled to the costs of this appeal.

Solicitors for the Appellant : *Robert Oldershaw & Son.*

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CHURN	CHATTER-
JEE.	—

J. C. KALI KISHEN TAGORE DEFENDANT ;
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June, 10, 11. JODOO LAL MULLICK PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Riparian Proprietors—Flow of Water—Encroachment.

The Plaintiff and Defendant were proprietors of land and gardens on opposite sides of a tidal creek, which sides were protected by walls. The Defendant, the wall on his side becoming dilapidated, constructed a fresh one, altering its direction, and encroaching five feet upon the bed of the stream.

In a suit for possession of land by demolishing the said wall, the Plaintiff alleged that he was entitled to the *solum* on which it was built, that his navigation was obstructed, and that there was a danger of his screw-house falling down ; it appeared however that the Government and not the Plaintiff was the owner of the *solum*, and that the Plaintiff neither claimed nor proved that he was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights :—

Held, reversing the decree of the High Court, that the Plaintiff had failed to shew either *damnum* or *injuria*, and therefore had no right of action.

Dickett v. Morris (1) considered.

APPEAL from a decree of the High Court (July 4, 1875), reversing on special appeal the decisions of the Moonsiff and Judge of the Twenty-four Pergunnahs, dated respectively the 24th of July, 1872, and June 28, 1873, which dismissed the Respondent's suit.

The facts of the case are stated in the judgment of their Lordships. The question was as to the right of the Respondent to have a certain portion of a retaining wall built by the Appellant on the side of a khal, or tidal drain, which separates their respective lands, pulled down and removed, on the ground that it encroached on the khal in question, and might cause danger to the Respondent's premises.

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

The two first Courts held in effect that, though there appeared to have been some encroachment at one point on the channel of the khal, by the retaining wall in question, which did not exactly follow the course of the old retaining wall that had fallen down, but in one place advanced beyond that wall, and in another did not go so far as the latter had done into the bed of the khal, yet that the Plaintiff had failed to shew that any damage necessarily resulted to his property from such deviations.

The High Court in their first judgment, on the authority of the case of *Bickett v. Morris* (1), held that in the case of any encroachment on such a watercourse as the khal in question "the probability of future damage was a matter not necessary to be considered," and that the Plaintiff had a right without such proof to have the encroachment removed, and accordingly remanded the case to the Lower Appellate Court to have the extent of the encroachment ascertained.

The Judge of the Lower Court found and reported as to the extent of the alleged encroachment. The Divisional Bench of the High Court, differing therefrom and arriving at another conclusion as to the extent, directed the encroachment so found to be removed.

Leith, Q.C., and Doyne, for the Appellant, contended that the circumstances of the case differed from those of *Bickett v. Morris* (1). The Courts had found that there was no immediate or prospective damage to the Respondent; and that he had no title to the bed of the khal or to the *solum* on which the Appellant's wall had been constructed. The decided cases go so far as to reduce flowing streams to inutility. If no riparian proprietor may diminish the water of the adjacent stream at all, notwithstanding that he causes no damage to others, it follows that he is deprived of all rights with regard to the water; e.g., to give drink to his cattle or to water his garden. It must depend on the circumstances of each case what use is a reasonable use: *Orr Ewing v. Colquhoun* (2). There must at least be an *injuria*, something which entitles the Plaintiff to nominal damages as an infringement of a right, in this case of an incorporeal private right. Reference was made to *Miner v.*

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J. C. *Gilmour* (1), cited in the last case : *Williams v. Morland* (2); *Gale* on Easements, p. 193. *Bickett v. Morris* (3) does not apply; first, it is not an authority in an Indian case which must be governed by equity and good conscience ; second, if it expresses a general principle the case in 2 App. Cas. shews that a sensible injury must be the foundation of the suit and then a remedy would be applied in equity. The evidence here clearly shews that there was no injury, that the encroachment did not produce any bad effect on the rights of the riparian proprietors. The judgment of the High Court proceeds entirely on the ground that this is an encroachment and therefore illegal, and consequently that the Respondent was entitled to its removal. SIR BARNES PEACOCK :—It is not found to be an encroachment on the easement but on the land. It is not found that there was an easement.] Counsel were stopped by their Lordships.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

In this case the Plaintiff and Defendant were proprietors of land and gardens on opposite sides of a khal in which the tide in the River *Hooghly* flowed and re-flowed, and by which the surface water of certain lands was carried in a direction from the east to the west into the *Hooghly*. The Plaintiff was the proprietor on the north side, the Defendant on the south side just at the mouth of the khal. It seems that it is a tidal creek which is daily subject to the flow of the river ; that for the protection of the banks on each side of the khal, walls had been erected, one at each side of the khal, and that the Defendant, upon the wall on his side becoming somewhat dilapidated, constructed a fresh one, and employed a skilled person to do so, who to some degree altered the direction of the wall ; a portion of it he built further in towards the Defendant's land than it had been before, and another small portion he built a little further out. We have the precise

(1) 12 Moo. P. C. 156.

(2) 2 B. & C. 910.

(3) Law Rep. 1 H. L., Sc. 47.

extent to which it was built further out, which was five feet, making what may be called in one sense an encroachment, consisting of a triangle whose altitude was five feet, and whose base was about double that length. The Plaintiff, it appears, first applied to Mr. *Whitfield*, the Government engineer, desiring Mr. *Whitfield* to interfere, on the ground that the Defendant's wall was an obstruction to the public navigation in the khal which belonged to the Government. Mr. *Whitfield* declined, however to interfere, on many grounds, one of which was that the khal was not navigable, and another that there was in his opinion, no obstruction.

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The Plaintiff thereupon brought this action. It is stated to be a suit "for possession of land by demolishing a brick-built retaining wall." He goes on to aver :—"By the said act of the Defendant, injury having accrued to the retaining wall of my garden and inconvenience having been caused to the passage of boats to my screw-house through the said khal, and apprehensions being created as to the screw-house falling down eventually, a cause of action has arisen. Therefore my prayer is that a decree be given directing the removal of everything built by the Defendant that stands on the disputed land mentioned below, and awarding me possession of the land and khal in question." His case was that he was entitled to the *solum* on which the Defendant had built his wall ; that his navigation was obstructed, and that there was a danger of his screw-house falling down. It is true that he subsequently presented a petition in which he prayed that if he was not entitled to possession of the disputed land, still, if it was found that the retaining wall ought to be removed, there should be a decree granting that remedy. The petition was however rejected.

The case came before two subordinate Courts. The Court of the moonsiff found that the Plaintiff had no right to the bed of the khal or any part of it, but that the Defendant had a right *ad medium filum*. He further found that the khal was not navigable, and that no injury had been caused to the Plaintiff, and that the flow of the water had not been in any way sensibly obstructed.

On appeal to the Subordinate Judge, he affirmed the findings, with an exception which constitutes the chief difference between the decrees, that neither the Plaintiff nor the Defendant had any

J. C. right to the bed of the khal, which it would appear is vested in
 1879 the Government in right of their zemindary of the twenty-four
 — Pergunnahs. The finding of the Subordinate Judge is in these
 KALI terms : " The conclusion, therefore, at which I arrive is that the
 KISHEN Defendant has in fact committed an encroachment, though not
 TAGORE upon the Plaintiff's property ; but that it is not established that
 v. damage to the Plaintiff's property must necessarily result from
 JODOO LAL the encroachment. Plaintiff, therefore, is not entitled to have the
 MULLICK. wall removed."

The case came on special appeal before the High Court and the High Court, having remanded the case for the purpose of ascertaining the precise extent of the encroachment, considered themselves bound to reverse the decisions of both the Courts, and to order the removal of a portion of the Defendant's wall, apparently on the authority of the case of *Bickett v. Morris et Ux.*, which is reported in Law Rep. 1 H. L., Sc. p. 47. The effect of that case may be stated thus A riparian proprietor on one side of a stream complained of the riparian proprietor on the other side, who had built into the *solum* of the stream beyond a line which had been agreed upon between the parties, and had thereby obstructed and changed the flow of the water so that the Plaintiff's right to have the water flow in its accustomed manner was injured. It was held that such an obstruction was such an injury to the Plaintiff's rights as enabled him to support the action without proof of actual damage immediate or even probable. The *ratio decidendi* is illustrated by the remark of the Lord Chancellor. " It was asked in argument whether a proprietor on the banks of a river might not build a boat-house upon it ? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course ; but if the erection produced this effect, the answer would be that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted."

Their Lordships observe that in a subsequent case in the House of Lords of *Orr Ewing v. Colquhoun*, reported in 2 App. Cas. p. 839, not in itself having much bearing on the present, inasmuch as it related to the obstruction of a navigable stream, Lord *Blackburn* explains the previous case in this manner : " The Defender had,

without any right built an encroachment on his side of the river which necessarily caused more water to flow on the Pursuer's side, and though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietary right of the Pursuer, but he was not able to qualify present damage."

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Their Lordships are of opinion that the case of *Bickett v. Morris* (1) does not govern the present. In the first place, the Plaintiff does not state his cause of action in the manner in which it was stated in *Bickett v. Morris* (1). The Plaintiff does not state that he, as a riparian proprietor, was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights; but he puts his case on the ground that he is the owner of the soil on which the wall was built, an issue which is found against him. It is true that he sought to enlarge his plaint, and avail himself of any ground he might have for obtaining the removal of this wall; but their Lordships do not find that he has either claimed or proved such an easement as that which has been described in the case of *Bickett v. Morris* (1), and which was there interfered with, or that, any issue was raised as to such a right of easement. It appears that the Plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad medium filum*. It may be that this khal being in possession of the Government, the Government may be able to do what they like with it; and if the Plaintiff would have no right to complain as against them of any interference with the flow, it does not seem clear what right he could have against a riparian proprietor on the other side. But further it has not been found in this case—indeed the evidence on the whole points in the other direction—that the Defendant, by what he has done, has to use the words of Lord *Blackburn* sensibly altered the flow of water. Without establishing this, the Plaintiff has failed to shew any such injury to his right as would support an action. All that has been found is that the Defendant encroached on the bed of the khal, which is the soil of the Government, without causing any sensible injury to the Plaintiff. There may be, where a right is

(1) Law Rep. 1 H. L. Sc. 47.

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interfered with, *injuria sine damno* sufficient to found an action ; but no action can be maintained where there is neither *damnum* nor *injuria*.

Under these circumstances their Lordships are of opinion that the High Court was wrong in reversing the decision of the Lower Courts and ordering, as they did, the wall to be removed ; and their Lordships are of opinion that the decision of the Subordinate Judge was right.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court be reversed ; that the judgment of the Subordinate Judge be affirmed ; and that the Appellant have the costs of the appeal in the High Court and also the costs of this appeal.

Solicitors for the Appellant : *Wrentmore & Swinhoe.*

J. C.* RAMASAWMI AIYAN AND OTHERS . . . DEFENDANTS ;
AND
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—
VENCATARAMAIYAN PLAINTIFF.
May 6, 8 10,
13, 14 ;
June 14.

Hindu Law—Rights of Adopted Son—Agreement by Adoptive Mother with Natural Father in derogation of the Infant Adopted Son's Rights—Rati-fication.

A Hindu widow, living her husband's minor adopted son, alienated two-thirds of her husband's estate. On the son's death, she being heiress to the son, but under authority from her husband, adopted the Plaintiff, while an infant, whose natural father gave him in adoption under an agreement that he would inherit only about one-third of his late adoptive father's estate, being aware are not caring to inquire how the two-thirds thereof had been disposed of. The plaintiff, two years after coming of age, and his adoptive mother executed an agreement, dated the 19th of August, 1871, and reciting the said alienations, whereby mother and son entered into a family arrangement with respect to the residue.

In a suit by the Plaintiff against his adoptive mother and the alienees of the two-thirds of the estate, to set aside the said alienations, and to recover

**Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.*

all the estate which was of the adoptive father, alleging himself to have been ousted from the whole thereof, it appeared that the agreement of 1871 was voluntarily executed by him whilst he was aware of his rights and under the advice of third parties, strangers to his adoptive mother :—

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—

Held, that the agreement of the natural father above mentioned was not void, but was at least capable of ratification when his son came of age; and that the same was validly ratified by the said agreement of the 19th of August, 1871

Quære, can a natural father by agreement before adoption renounce all or part of his son's right, so as to bind that son when he comes of age?

APPEAL from a decree of the High Court (Jan. 24, 1877), reversing a decree of the District Court of *Trichinopoly* (Jan. 15, 1875).

The suit was brought in December, 1873, on behalf of the Respondent, as heir of one *Rangasawmy*, by virtue of an adoption made by the widow after *Rangasawmy*'s death, to set aside various dispositions of the property made by the widow before the adoption. The Appellants are the widow and the various persons who claimed under the disputed transactions.

Neither the adoption nor the transactions in dispute were denied. The defence set up was that the Appellant had been adopted in 1852 upon the faith of an express written agreement by his father that none of the transactions which were sought to be set aside were to be disputed, and that the said agreement was ratified in writing by the Plaintiff himself in 1871, two years after he came of age. The agreement by the father, and the ratification by the son, were both admitted. The District Judge of *Trichinopoly* dismissed the suit, holding that the Plaintiff had come of age in 1869, and that he was estopped by his own ratification in 1871. The High Court, on appeal, affirmed the finding that the Plaintiff had ceased to be a minor in 1869, but reversed the finding of the District Judge of *Trichinopoly*, on the grounds that the agreement entered into by the Plaintiff's father on giving him in adoption was inoperative, and that he was not bound by his own ratification, since it was given without full knowledge of the circumstances.

The facts of the case, and the various agreements, are set forth in the judgment of their Lordships.

Leith, Q.C., and Mayne, for the Appellants, contended that the

J. C. alienations complained of took place under the express written
 1879 directions of *Rangasawmy*, the deceased adoptive father, and were
 RAMASAWMI therefore binding on the Respondent, who was not adopted till
 AIYAN long afterwards. Further, he was bound by the agreement of the
 v. VENCATA- 5th of July, 1862, executed by his natural father and guardian.
 RAMAIYAN. Reference was made to *Chitko Raghunath Rajadiksk and others v. Janaki* (1); *Vinayak Narayan Jog v. Govindrao Chintaman Jog* (2). There is nothing in Hindu law to invalidate an agreement made on the occasion of an adoption; and such an agreement cannot be treated as void. The natural father has the fullest discretion whether he will give his son in adoption or not, and as to the terms. There is no evidence that the agreement was not *bona fide* and in the interests of the child.

There is no evidence that the child would not have been worse off in the family of birth than in the family of adoption under the agreement. The adoption was only entered into on the faith of the agreement, and if the latter fails, what becomes of the adoption? Then, assuming the adoption and the conditions under which it was made to hold good, the rights of an adopted son are similar to those of a posthumous son: see *Bamundoss Mookerjee v. Mussamut Tarinee* (3); *Ranee Kishenmunee v. Rajah Oodwunt Singh* (4); *Gobindonath Roy v. Ramkanay Chowdhry* (5).

Cowie, Q.C., and Graham, for the Respondent, contended that all the alienations complained of were acts of fraud and conspiracy, and direct breaches of trust on the part of the widow, i.e. the adoptive mother. The agreement of the 5th of July, 1862, whether executed before or after the Respondent's adoption, is not binding on him, and cannot preclude him from questioning the several alienations made by and to the Defendants, or any of them, after the death of his adoptive father. Moreover, the muktiarnamah of the 9th of February, 1861, in pursuance of which the alienations were made, is not shewn on the evidence to be genuine. The fiduciary character of *Ramasawmi* threw upon

(1) 11 Bombay H. C. R. 199.

(3) 7 Moo. Ind. Ap. 169.

(2) 6 Bombay H. C. R. 224-9.

(4) 3 S. D. A. (Bengal) 229.

(5) 24 Suth. W. R. 183.

him the burden of proving the existence of the alleged debts of *Rangasawmi*, for the discharge of which the alienations, or some of them, were made ; and also the burden of proving that all disclosures necessary to give validity to the agreement of the 19th of August, 1871, had been made to the Respondent and his friends by the Appellant prior to its execution ; and of proving that the Respondent had as full and ample opportunities as the Appellants of judging of the effect and consequences of his executing such agreement. Upon the evidence, that burden had not been discharged. The natural father is not so completely proprietor of his son as to be able to renounce his rights, as they accrue to him from adoption, or to qualify them in any way.

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Leith, Q.C., replied.

The judgment of their Lordships was delivered by

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SIR ROBERT P. COLLIER :—

June 14

The facts of this case material to its decision are as follows :—

Rangasawmi Aiyan was the youngest of three brothers of a joint Hindu family. The eldest brother died in the year 1858, leaving a widow named *Thyamal*. On his death the two remaining brothers made a partition of the property to which they were entitled. The second brother died in 1860, leaving a widow named *Lakshmi Ammal*. *Rangasawmi* had a wife, the daughter of *Ramasawmi*, who was his cousin, and was the brother of *Thyamal*. *Rangasawmi* having no children executed on the 19th of January, 1861 the following document :—

“ Agreement executed on the 19th of January, 1861, by me, *Rangasamiaiyan*, son of *Subbaiyan*, residing at *Minakshipuram*, in the *Trichinopoly* talook, while in the possession of sound mind, in favour of *Ramasamiaiyan*, son of *Anantakrishnaiyan*, residing at *Kulumani* in the said talook, to wit :—

“ In the villages of *Minakshipuram* aforesaid, *Gouripuram*, *Tiruppulatturai*, *Analai*, *Rangachchipuram*, *Elumanur*, *Antamallur*, *Amangudi*, *Kulumani*, *Mulangudi*, *Tachchagudi*, and *Kottattai*, I hold some property. Besides, in respect of the moveable and

J. C. immovable property standing in the names of *Lakshmi Ammal*,
 1879 the widow of *Visvanadhaiyan*, my elder brother, and others, I
 RAMASAWMI brought a suit in No. 5 of 1860 on the file of the Civil Court,
 AIYAN which is now pending in appeal before the Sadar Court in No.—
 VENCATARA. of 1860. My present state of health is however too bad to
 MAIYAN. permit me to manage and take care of the said (last-mentioned)
 property, as well as the said (first-mentioned) house ground,
 houses, cattle, etc. Besides I have no issue and have conse-
 quently adopted your son *Krishnasami* this day according to law.
 You shall therefore yourself manage the affairs of all the move-
 able and immovable property, etc., except three cheis of land
 constituting two shares in the village of *Kulumani*, which I have
 given away to my elder sister *Tangammal* as manjakani (land
 granted for expenses), pay the Government revenue, etc., assessed
 thereon, render the necessary assistance in the interests of the said
 suit, and maintain my adopted son aforesaid. Besides, you should
 deliver up to the two persons aforesaid so soon as my said adopted
 son attained his age, all the said moveable and immovable
 property, and all the other property save such as might have been
 legitimately expended till then. Furthermore, you should ad-
 minister the charity of distributing boiled rice, etc., at my house
 in the village of *Minakshipuram*, and by applying therefor the
 incomes derivable from the wet and dry lands of that village left
 after paying the expenses, Government revenue, etc., keep an
 account of the receipts and disbursements in that matter, and you
 should get *Krishnasawmi*, my adopted son aforesaid, after he
 attained his age, and *Lokambal* my wife, these two to administer
 these charities in perpetuity, and in a manner allowing no scope
 for any shortcomings.

“ You should also, while thus acting and until my son attained
 his age, look after the duties of the office of manager, which I
 hold in my name with respect to the *Tiruppulatturai* pagoda.

“ To this effect, I, *Rangasawmi Aiyan*, execute the agreement in
 favour of *Ramasawmi Aiyan*.”

In pursuance of this instrument the child therein mentioned
 was adopted, and *Rangasawmi* undertook the management of the
 estate.

On the 9th of February, 1861, *Rangasawmi* executed the following instrument, which is termed in the record a *muktiarnama*.

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"Muktiarnama (general power of attorney) executed on the 9th of February, 1861, by *Rangasawmi Aiyan*, son of *Subbaiyan*, residing at *Minakshipuram*, in the *Trichinopoly* talook, in favour of *Ramasawmi Aiyan*, son of *Anantakrishnaiyan*, residing in the village of *Kulumani*, in the said talook, to wit:—At present the state of my health is not satisfactory, and I have no issue. Besides, for the management of my own immovable property which I am in the enjoyment of, for the conduct of the suit which I brought in No. 5 of 1860 on the file of the Civil Court against *Lakshmi Ammal*, the widow of *Visvanadhaiyan*, my elder brother, touching certain property, and which I have now brought on appeal in No. 25 of the same year, on the file of the Sadr Court, and for the looking after of my adopted son, *Krishnasawmi*, minor, my wife and myself, I have no friend to look up to but yourself. You should therefore look after us as mentioned above, and hold all my property according to your pleasure and manage the same. If the said Sadr Appeal No. 25 should also terminate against me, you should take upon yourself and manage the dry and wet land forming the eleven pangus (shares) in the village of *Minakshipuram*, the four pangus (shares) in *Analai*, one pangu (share) in *Tiruppilatturai*, and one pangu (share) in *Tachchangudi*, one house-ground in *Kulumani*, out of the property in my possession and, without concern in the profit or loss therefrom arising, make the same over to my adopted son after he attained his majority. Besides, as I have consented to *Tayammal*, the widow of my elder brother, *Venkataramaiyan*, making an adoption, which she is attempting to do in accordance with the authority given by my elder brother aforesaid, you should get my wife to give up out of our property to the said ammal (lady) the one-third share of my elder brother aforesaid, a dwelling-house, one *Machchupatti* house-ground, cattle, ploughs, etc., all in a group, with liberty to alienate the same by sale, and to appropriate the same according to her own pleasure. The remaining lands you should get my wife to dispose of by sale, etc., in satisfaction of the debts contracted by me for the family expenses and for the costs of the said suit, and clear off my debts in full. You are at liberty yourself to demand

J. C. and recover the sundry debts due to me. All prior documents of
 1879 any kind whatsoever referring to the above subject shall become
 — null. I have thus with my full consent executed to you this
 RAMASAWMI muktiarnama (general power of attorney)."

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 RAMAIYAN. — The High Court of *Madras*, of whose judgment some notes, obviously very imperfect, are to be found in the record, appear to have treated this document, which was not registered, as open to much suspicion. It may be, but inasmuch as it has been found to be genuine by the Lower Court, before which some of the attesting witnesses were called, while no evidence directly impeaching it was produced, their Lordships find no sufficient grounds for disbelieving its execution, or setting it aside as invalid.

Rangasawmi died in 1861, not long after the execution of this document, but the precise date of his death does not appear.

On the 10th of June, 1862, the widow of *Rangasawmi*, *Lokambal* assuming to act under the directions of the muktiarnama, executed a release to *Thyammal* of what may be described in general terms as one-third of the family property.

On the 23rd of June, 1862, *Lokambal*, assuming to act under the same authority, executed three deeds of sale, to one *Vamanaiyan*, of what may be described in general terms as another one-third of the property for advances alleged to have been made to her for the payment of her husband's debts.

It appears that the property conveyed to *Thyammal* found its way, after some interval, into the hands of her brother, *Ramasawmi*, and that by the last three deeds *Lokambal* in effect conveyed the property to which they refer to *Ramasawmi*, her father, who admits the sale of the nominal purchaser to have been benamee for him, alleging that he paid the consideration-money, and that it was appropriated to the payment of the debts of *Rangasawmi*. Almost immediately after the execution of these deeds the adopted son died.

Thereupon the widow proceeded to make a new adoption under authority from her husband (as is now conceded), and with this object entered into the following agreement with one *Mutturamaiyan* for the adoption of his son, who is the plaintiff in this suit.

"Agreement executed on the 23rd Ani of Dundubhi, corre-

sponding to the 5th of July, 1862, by *Mutturamaiyan*, son of J. C. *Venkaiyan*, residing at *Dikshasamudram*, otherwise known as 1879 *Mullakudi* in the *Trivadi* talook, in the *Kumbakonam* district, in RAMASWAMI favour of *Lokambal Ammal*, the widow of *Rangasawmi Aiyan*, AIYAN residing at *Minakshiammalpuram*, in the *Trichinopoly* talook, in v. the *Trichinopoly* district, and *Ramasawmi Aiyan*, the authorized VENCATA-
RAMAIYAN. agent of the said *Rungasawmi Aiyan*, to wit :—

"After entering into a partition, the said *Rangasawmi Aiyan* adopted *Krishnasawmi*, a minor, and died some time afterwards ; and, some time after this, *Krishnasawmi* also died. Thereupon, with a view to the fulfilment of the said *Rangasawmi Aiyan*'s wish to make an adoption, I gave my son, *Chidambaram alias Venkataraman*, in adoption to the said *Lokambal Ammal* according to law with my full consent. Excluding the sales of property made to third parties in satisfaction of the debts contracted by the said *Rangasawmi Aiyan*, and the absolute disposition of property made in favour of *Thyammal*, the widow of *Venkataramaiyan*, his elder brother, for her share, all of which took place so far back as during the lifetime of the said minor, *Krishnasawmi*, the said *Lokambal Ammal* is now possessed and in the enjoyment of eleven pungus (shares) of wet land and the wet and dry samudayams appertaining thereto in *Minakshiammalpuram* aforesaid, setting aside the house-ground of *Muttulinga Mudaliar* and the patti manai lying to the west of it, of one pungu (share) of wet lands and the samudayams thereto appertaining in *Tirupilattorai*, setting aside the house-ground of *Pannai Seturaiyar*, of one of the house-grounds which fell to his share in the agraaharam of the village of *Kulumani*, of one pungu (share) in the village of *Tachchangudi*, and of four pungus (shares) in the village of *Analai*, with the samudayams thereto appertaining. Beyond this property which is in her possession, the said ammal (lady) has no property. Agreeing, therefore, to my begotten son, *Chidambaram alias Venkataraman*, who is the minor adopted son above mentioned, being put in possession of the said property, which now remains, after he attained his majority, I have, with my full consent, given my said son in adoption. I have therefore executed to you this agreement to shew that you alone, who are henceforth entitled to all sorts of rights until the adopted son aforesaid should attain his

J. C. age, and competent to solemnize his wedding, and other auspicious
 1879 ceremonies, should look after the said adopted son and the said
 — property ; that, whether or not there is more property, neither I
 RAMASAWMI nor my be gotten son, who is the adopted son above mentioned,
 AIYAN have any sort of claim or title to the same, or to their enjoyment.
 —
 VENCATA- ("Signed) *Mutturamaiyan.*"
 RAMAIYAN.

It is in evidence that *Mutturamaiyan* was informed that two-thirds of the property had been alienated, and was shewn the muktiarnama and the four deeds which have been referred to. Thus, if not distinctly informed of the true nature of the transactions, he was at the least put upon inquiry respecting them ; it is not alleged, much less proved, that any fraud was practised upon him, and on his being called as a witness by both parties no question was put to him suggesting that he had been induced to make this agreement by any misrepresentation or concealment. Their Lordships, therefore, feel themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late *Rangasawmi*'s property, being aware or not caring to inquire how the remaining two-thirds had been disposed of. The legal effect of this proceeding will be dealt with hereafter. The Plaintiff, shortly after he became of age, which time is found by both Courts to have been in 1869, executed a lease (dated 4th October, 1869), to *Naganadien*, a son of *Ramasawmi*, of all or almost all the lands to which he was entitled, for thirteen years, at a "swaun-bogam" rent of Rs.150 per annum ; the lessee further undertaking to maintain the Plaintiff and his adoptive mother.

This lease, which put him entirely in the power of *Ramasawmi*'s son, or, in other words, of *Ramasawmi* himself, and which he certainly ought not to have been induced or even allowed to execute, he some time afterwards very naturally desired to set aside, and, his adoptive family insisting on maintaining it, he left his adoptive mother's house, married, and went to live at the house of his wife's father. Although he returned once or more to his adoptive mother's house, it was when he was living in the house of his wife's father and surrounded by her relations that he executed, on the 19th of August, 1871, the agreement, on the validity of which the case chiefly depends.

This agreement is as follows :—

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“ Agreement executed on the 19th of August, 1871, corresponding to the 5th Avani of Prajotpatti, to *Lokambal Ammal*, the widow of *Rangasawmi Aiyan*, cultivator, residing in the village of *Minakshipuram*, in the *Trichinopoly* talook, by *Chidambaram, alias Venkataramaiyan*, the adopted son of the said lady, cultivator, residing at the said place, to wit :—

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“Out of the wet and dry lands, topes, house-grounds, purchases, and other landed property which came to the share of your said husband on partition as his own property in the village of *Minakshipuram, Gouripuram, Analai, Rangachchipuram, Tiruppilatturai, Andanallur, Ammangudi, Kulumani, Mulongudi, Tachchangudi, and Kottattai*, the following being excluded, *i.e.*, the landed property which, by virtue of a muktiarnamah granted by your said husband in the name of your father, *Ramasawmi Aiyan*, on the 4th of February, 1861, before ever I was adopted by you, and of an agreement granted in conformity therewith to you and your father, *Ramasawmi Aiyan*, by my natural father, *Ramuvaian* on the 5th of July, 1862, you gave away on the 10th and 23rd of June, 1862, in obedience to the orders of your said husband, *Rangasawmi Aiyan*, deceased partly under an agreement to *Thayammal*, the widow of his elder brother, *Venkataramaiyan*, with power to sell, and partly under deeds of absolute sale, in favour of *Kulumani Vamanaiyan* in satisfaction of the debts contracted by your husband, *Rangasawmi Aiyan*, and which your father *Ramasawmi Aiyan* had cleared with his own funds ; there still remain 8 pungus in the village of *Minakshipuram* after deducting the 3 pungus lost owing to the railway out of the 11 pungus had there, 4 pungus in *Analai*, 1 pungu in *Tiruppilatturai*, 1 pungu in *Tachchangudi*, and 30 feet of a house-ground to the east of *Chelamaiyan*’s house-ground in the northern row in the *Suryavastu Aghaharam* of *Kulumani* which you have continued to hold in full right. These I, having attained my majority, got from you, and took charge of the said property just as they were in accordance with the above said arrangements ; and in 1869 I leased the said lands to *Naganadhaiyan* for a swamibhogam ready money rent, and got the registry transferred accordingly. Of these lands

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I gave your father, *Ramaswami Aiyan*, 6 pungus in the village of *Minakshipuram*, measuring acres 10 and dec. 8 and 1 pungu in the village of *Tachchangudi*, measuring acres 3 and dec. 35 ; in all, measuring acres 13 and dec. 32 of land, together with the dry and wet lands and all other samudayams thereto appertaining, and a house-ground in the village of *Kulumani*, as per the descriptive statement of lands contained in the additional paper hereto annexed, and got in exchange acres 14 and dec. 30 of land, comprised in the 5 3/16 pungus purchased by the said *Ramaswami Aiyan* from the said *Thayammal* and *Vamanaiyan* under a deed and an agreement i.e. 2 13/16 pungus in the village of *Analai*, and 2 3/8 pungus in the village of *Rangachchipuram*, including *Pudutiruttukattalia*, together with the wet and dry lands and all other samudayams appertaining thereto, as also 32 feet of a house-ground where *Pannai Setuvaiyan* resides, and which belongs to the said *Ramaswami Aiyan*, in the Suryavasaka Agraharam of the village of *Tiruppalatturai*, and 24 feet of a house-ground purchased under a deed by the said *Ramaswami Aiyan* from *Manamettu Chetti* in the western row of the agraharam, running north to south, in the garudavasakam of the said village as per the descriptive statement of lands contained in the additional paper hereto annexed. Notwithstanding all this, I have given you for your maintenance for life, in consideration of your feeling it disagreeable to live with me, the 2 3/8 pungus which I got in exchange as aforesaid in the said village of *Rangachchipuram* and 2 of the pungus in the village of *Minakshipuram*, making in all 4 3/8 pungus, together with the wet and dry lands and all other samudayams thereto appertaining. You shall therefore enjoy the said lands for your life, paying the Government revenue assessed thereon, and defraying the expenses of your maintenance, vows and other ceremonies, with the aid of the incomes thereof. The said lands should revert to me upon your death. You should not subject the said lands, which have been allowed to you, to hypothecation, mortgage, or sale, or otherwise encumber or alienate them. For myself, I agree that, inasmuch as the lands which I enjoy were derived from you, I shall not without your written consent subject them to hypothecation or sale, or otherwise encumber or alienate them. As regards any property other than what has come to you and

me under this document, and the landed property passed by you under sale and agreement in obedience to the orders of your husband, I have no claim, interest, or title. As regards the 2 pungus I am entitled to enjoy by reversion on your death in the village of *Minakshipuram*, I shall take the share of Mettupadugai dry land appertaining thereto, out of the tract lying to the west of the Mattupadai (cattle pass). Thus I have executed this agreement.

"The lands, etc., of the village of *Elumanur* are included in the deed of sale you executed in favour of the said *Vamanaiyan*.

"(Signed) *Chidambaram, alias Venkataramaiyan.*"

A schedule is appended, specifying in detail the properties to which the mother and son are respectively entitled.

In the year 1873 the Plaintiff instituted a suit against the present Defendants, which was by a lamentable miscarriage of justice dismissed on the ground that he declared himself to be seventeen years old, and ought until he was eighteen to have sued by his guardian.

Whereupon he instituted the present suit by his guardian, at first *in forma pauperis*, but was not allowed to retain that character in his appeal to the High Court.

The suit is against *Lokambal, Ramasawmi Naganadha* (the son of *Ramasawmi*, and the lessee under the deed of October, 1869), *Thyammal* and *Manaiyan alias Vailalingaiyan*, who was made a Defendant which at his own request.

The plaint, which is informal and obscure, in substance seeks to set aside all the alienations of the adoptive father's property which have been described, and claims all the property ; from the whole of which, even so much as the Defendants admit the Plaintiff to have been entitled to, he declares himself to have been ousted.

The Defendants maintain the genuineness and validity of the transactions which have been described, insist on the deed of the 19th of August 1871 being binding on the Plaintiff as a family settlement, and deny his dispossession of so much as he was entitled to under it.

The Subordinate Judge dismissed the suit, on the ground that the agreement of August, 1871, which he treats as a final adjustment of the family disputes, was executed by the Plaintiff two

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—

years after he became of age, was not obtained by fraud or coercion, and was consequently binding on him.

This judgment was reversed by the High Court, on grounds which do not very distinctly appear. That Court appears to have considered the agreement of the Plaintiff's natural father at his adoption to have been void in law in as far as it relinquished on behalf of the Plaintiff his right to any part of the property which had been his adoptive father's, that he was entitled to set aside the alienations made before his adoption as having been fraudulent and void against him, and that the agreement of August, 1871, was not binding on him, having been executed by him without a full explanation having been given to him of his rights. They appear also to have treated his allegation, of which he himself gave some evidence, of his dispossession from the whole of the property as established, and decreed to him all the property claimed in the schedule to his plaint, that is, all his adoptive father's property, together with (as is asserted by the Appellants) more property which he claimed by a supplemental schedule which he was allowed to file. The present appeal is from this judgment.

Some of the circumstances of this case are peculiar. The first adopted son became his father's heir ; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety, on which their Lordships give no opinion. How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty ; although the case of *Chitko Raghunath Rajadiksh and others v. Janaki*, in the 11th volume of the *Bom̄bay High Court Reports*, p. 199, certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age. The main question in

the cause is therefore reduced to this, whether the son did or did not validly ratify it. Unquestionably the manner in which *Ramasawmi* contrived to get into his hands two-thirds of the property of *Rangasawmi*, partly through his daughter and partly through his sister, raises a very strong suspicion, to say the least, of unfair dealing against him ; and if it had been shewn that the instrument of 1871 had been executed by the Plaintiff under his influence (as probably the lease of October, 1869, was), it would be properly set aside. It must be borne in mind, however, that the plaintiff when he executed it had been of age two years, that he was sufficiently alive to his rights to be aware that the lease of 1869 was injurious to him, and to desire to set it aside, that he was residing with his wife's family, strangers it would appear to that of his adoptive mother, and that before executing the instrument he consulted members of his wife's family, upon whose advice he acted. It may be further observed that in a subsequent suit the Plaintiff, about twelve months after, stated that he enjoyed the property of his adoptive father under this agreement.

Such being the evidence, and the Subordinate Judge, who had the advantage of hearing the witnesses, having found in favour of the validity of this document, their Lordships have come to the conclusion that there are no sufficient grounds for setting it aside.

The main question being thus disposed of, two subsidiary questions remain to be noticed.

It was the Plaintiff's case, supported by some evidence, that he had never been allowed to take possession of any part of his adoptive father's property, while there was evidence on the other side that he had taken and kept possession of so much of it as he was entitled to under the deed of the 19th of August, 1871. There is no issue and no express finding on this question in the Court below, but it may be assumed that the Judge adopted the contention of the Defendants. The judgment of the High Court, however, assumes the Plaintiff to have been wholly dispossessed, and that by all the Defendants. Under these circumstances, it seems to their Lordships that the case cannot be satisfactorily disposed of without a re-trial of this question, if, indeed, it has been tried at all, and that an express finding should be come to whether the

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J. C. Plaintiff has been dispossessed, or kept out of possession, of all or
 1879 any of the property to which he was entitled by the last-men-
 RAMASAWMI tioned deed, and, if so, by which of the Defendants.

AIYAN v. It further appears that compensation money was paid to *Lokam-*
 VENCATARA-*bal* by the railway department for lands taken from the one-third
 MAIYAN. portion of the lands of *Rangasawmi* to which under the deed of
 adoption of the 5th of July, 1862, the plaintiff was entitled; the
 sum is stated by the Plaintiff to be Rs. 2,500, by the Defendant to
 be Rs. 1,700.

Their Lordships do not consider that, by the deed of the 19th of August, 1871, the main object of which seems to have been to ratify the disposition which had been made of the specified properties mentioned in it as "having been excluded," and to assign to the widow a specific portion of the remaining land in lieu of maintenance, the Plaintiff can be taken to have relinquished his claim to this money. An issue on this question was framed in the Court below, but it is not alluded to in the judgment. Their Lordships are of opinion that the question should be tried to how much of this sum the Plaintiff is entitled; it will, of course, be open to the Defendants to prove that the money received has been properly expended on the land, as they have alleged it to have been in their answer. On the legal effect of the Plaintiff's covenant against alienation their Lordships do not think it necessary to give an opinion.

In accordance with the views which they have expressed, their Lordships will humbly advise Her Majesty that the judgments and decrees of both the Lower Courts be reversed, and that it be declared that the parties are bound by the deed of the 19th of August, 1871. That the High Court be directed to remand the case to the District Court of *Trichinopoly* for the trial of the following issues, viz. :—

1. Whether the Plaintiff has been ousted or kept out of possession of all or any of the lands to which he was entitled under the said deed; if so, by which of the Defendants.
2. To how much, if any, of the said compensation money paid by the Railway Department he is entitled.

That the said District Court do return the findings on those issues to the High Court in accordance with the direction of the

Code of Civil Procedure, and that the High Court do thereupon finally determine the case.

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That each party do bear his own costs of this appeal, and that all the costs of the parties in the Lower Courts do abide the event of the final decision of the suit.

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Solicitors for the Appellants : *Burton, Yeates & Hart.*

Solicitors for the Respondent : *Gregory Rowcliffes & Co.*

RUGHOOBUR DYAL SAHOO AND OTHERS . PLAINTIFFS ;

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MAHARAJAH KISHEN PERTAB SAHEE . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Accretion by Gradual Accession—Riparian Proprietors—Effect of Sudden Change of the Course of a Boundary River—Regulation XI of 1825, sect. 4, cl. 1 and 2, stct. 2

The lands in suit (in *Tirhoot*) were settled under Regulation XI of 1825, sect. 4, cl. 1, with the Plaintiffs' predecessor in 1837, as the proprietors of an estate to which the lands had become an accretion by gradual accession, and the Plaintiffs continued in possession thereof till the expiration of the settlement in 1847, which was made on the same principle. Prior to the renewal of that settlement in 1857, the river, which was to the south of the Plaintiffs' zemindary (in *Tirhoot*) and to the north of the Defendant's (in *Sarun*), had suddenly and so completely changed its course that the lands in suit, which were formerly on the north side of the river, were capable of being identified on the south side of it, and were notwithstanding summarily settled with the Defendant, who obtained possession of them :—

Held, that in the absence of proof of usage within the meaning of sect. 2 of the Regulation, that the river should be not merely the boundary between the two districts of *Tirhoot* and *Sarun*, but also the boundary between the two zemindaries, the Plaintiffs were entitled to the lands.

APPEAL from a decree of the High Court (May 1, 1876) reversing a decree of the Subordinate Judge of *Sarun* (Nov. 16, 1874). These decrees were made after the suit had been remitted for trial on two additional issues by an order of Her Majesty in

* Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. Council (Aug. 4, 1873), which reversed in a former appeal a previous
 1879 decree of the same High Court (May 22, 1873). The original
 RUGHOOBUR suit, which was in the nature of a action of ejectment, was brought
 DYAL on the 31st of January, 1860, by the above-named Appellants as
 SAHOO zemindars and proprietors by purchase of mouzah *Sohagpoor*, in
 MAHARAJAH *Tirhoot*, against the father of the Respondent, whose ancestral
 KISHEN estate, including a village called *Doomree*, was situate in the district
 PERTAB of *Sarun*, and against seven other parties no longer parties to the
 SAHEE. suit.

The circumstances of the case and the proceedings in the suit prior to the remand are set forth in the judgment of their Lordships (Aug. 1, 1873), which is as follows :—

“ Their Lordships regret to find that they are not at present in a condition to recommend to Her Majesty to make an order which will finally determine the long litigation between the parties to this appeal.

“ The Defendant, the Maharajah of *Hutwah*, is the owner of a large estate in zillah *Sarun*, which comprises a village named *Doomree*, and for the purposes of this appeal may be called the *Doomree* estate. The Plaintiffs are zemindars in *Tirhoot*. Their estates comprise a mouzah called *Sohagpoor*, and may be designated by that name. The two zillahs are divided by the River *Gunduck*, which at that part of its course has a northern and a southern channel ; and it is proved beyond a doubt that during the dry months the main body of the stream as run sometimes in the northern and sometimes in the southern channel.

“ In 1790—91, when the two estates were permanently settled, the *Gunduck* ran in the northern channel ; which their Lordships think must be taken to have been at that time the boundary of the two zillahs, and also of the two estates—*Tirhoot* and ‘*Sohagpoor* lying on the northern, *Sarun* and *Doomree* on the southern bank of the stream.

“ In the year 1837 the river, whether by gradual recession or sudden shifting is not very clear, had got into the southern channel ; and a quantity of chur land to the north of that channel was then resumed by Government : and after an investigation which will be hereafter more particularly considered, a temporary

settlement of it for the term of seven years was made by the Collector of *Tirhoot* with the zemindars of *Sohagpoor*. This was confirmed by the Commissioner of Revenue on the 23rd of April, 1838 ; and in August, 1846, a second settlement of this land for a term beginning on the 1st of May, 1846, and ending on the 1st of May, 1856, was made by the same authority with the then zemindars of *Sohagpoor*. Under the two settlements these zemindars appear to have been in undisturbed possession until 1848, when the river having returned to the northern channel, the deara land so settled was claimed by the Defendant's father, and other proprietors on the southern or *Sarun* side of the river. This led to disputes, and to an Act IV of 1840 suit, which on the 16th of April, 1849, the magistrate of *Sarun* decided in favour of the zemindars of *Sohagpoor*, and his decision was confirmed on appeal by the Zillah Judge of *Sarun* on the 5th of October, 1849. It appears from these proceedings that, on that occasion, the jurisdiction over the lands in question was admitted to have passed, on the change in the channel of the river, from the *Tirhoot* to the *Sarun* authorities. Both the magistrate and the Judge, however, maintained the possession of the zemindars of *Sohagpoor* under the subsisting settlement ; leaving the *Sarun* claimants to establish their title by regular suit. Some such suit, as to part of the land, appears to have been brought ; but the final determination in it of the question of title was prevented by the proceedings which are next to be mentioned.

“ On the 1st of May, 1856, the last temporary settlement with the zemindars of *Sohagpoor* expired, and the question then arose with whom the Government should engage for the revenue of the deara land. On the 7th of January, 1857, the Collector of *Tirhoot* (Mr. *Lautour*) entertaining, in consequence of the change in the course of the river, doubts as to his jurisdiction to make a new settlement, though the revenue assessed under the previous settlements had always been paid into his treasury, brought the question before the Commissioner of *Patna*, Mr. *Tayler*. That officer held a proceeding on the 3rd of March (both parties being represented before him), and came to the following conclusion :—

“ ‘ In this suit I have no doubt in the matter which the Collector has referred to me for my opinion, because from the purport of

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the report of the Collector, it is evident that the lands appertaining to the deara settled, were, without any dispute, in possession of the proprietors of *Sohagpoor*, and the revenue has been paid by them to the collectorate of zillah *Tirhoot*; under these circumstances, the stream of the river having been changed, the rights and interests of the proprietors cannot be prejudiced thereby. Neither can the boundary be altered, as, for instance, there is much land on this side the *Ganges* which still belong to *Patna*; therefore,

“ ‘Ordered—

“ ‘That an answer to the letter of the Collector of zillah *Tirhoot* be forwarded to him, and he should act according to the directions in the said letter.’

“And, on the 15th of March, 1857, he wrote a letter to the same effect to the Collector of *Tirhoot*, who resettled the deara with the zemindars of *Sohagpoor*, by a proceeding, dated the 15th of April, 1857. The Appellant, however, appealed against this settlement to the Commissioner, and, through him, to the Board of Revenue; and the decision of the latter body was given on the 4th of September, 1857, in a letter from their Secretary, of which the following are the material paragraphs :—

“ ‘2nd. At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the *Gunduck* should be the constant boundary between the two districts of *Sarun* and *Tirhoot*, and between the zemindaries on each bank divided by the river.

“ ‘3rd. In accordance with this usage, the chur, the object of the present dispute, has been twice temporarily settled with the Maliks of mouzah *Sohagpoor* on the *Tirhoot* side, on which estate it was an increment, the main channel of the *Gunduck* being to the westward of the chur. On the expiry of the last lease, when the chur became open to settlement as if it had been a new formation, *Maharajah Cuttardharee Sahai* claimed the settlement to be made with him, as the lands by a change in the main channel of the river had become separated from *Sohagpoor*, and formed then an increment on his estate within the district of *Sarun*.

“ ‘4th. Local inquiries by the proper officers verified this fact,

but on reference to him, Mr. *Tayler*, the Commissioner, directed the settlement to be again made by the Collector of *Tirhoot* with the Maliks of *Sohagpoor*, as they were in possession, and the lands of the chur, not having been washed away, were fully capable of identification.

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“ ‘5th. But the lessee’s right of occupancy, the Board are of opinion, ceased with his lease, and Mr. *Tayler*’s decision is not only opposed to established usage, and to Section 2, Regulation XI of 1825, but also to the principle laid down in the Sudder Court’s decision in the case of *Rajah Gresh Chand*, Appellant, v. *Maharajah Tez Chand*, Respondent (1), in which the Court disallowed the Plaintiff’s claim to alluvial lands which had originally formed in his estate, and had afterwards become united to the Defendant’s estate by the return of the river to its former course.

“ ‘6th. The Board would particularly refer to the note in this case, as shewing the distinction between the separation by change in the course of a river of an alluvial increment not incorporated with an original estate by permanent settlement, and the separation from the same cause of a portion of original land from its parent estate, provided for in clause 2, section 4, Regulation XI of 1825. In the advertisement to this volume of the Reports, the notes are stated to have been written or approved of by the Judges who decided the cases, and they are consequently entitled to weight.

“ ‘7th. Under these circumstances, the Board have reversed Mr. *Tayler*’s orders appealed against, and they will be obliged if you will direct, in case the lands remain in their present state, that the papers and proceeding may be made over to the Collector of *Sarun*, within whose jurisdiction the chur now lies, in order that he may form a settlement of it with the Petitioner *Maharajah Chuttardharee Sahai*.’

“ In conformity with the directions contained in this letter, a summary settlement of the deara lands, which are the subject of this appeal, was made with the Maharajah of *Hutwa*, who obtained possession of them.

“ The present suit was brought on the 31st of January, 1860, by

J. C. the zemindars of *Sohagpoor*, to impeach the ruling of the Board
 1879 of Revenue, and the settlement made under it, and to recover pos-
 session of the lands in dispute.

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“This being the object of the suit, it is desirable to observe what were the principles laid down by the Board of Revenue, upon which the settlement with the Plaintiff was set aside, the new settlement made, and the possession of the property changed. They are :—

“1. That a clear and distinct usage that the main channel of the *Gunduck* should be the constant boundary not only between the two districts of *Sarun* and *Tirhoot*, but between the zemindaries on each bank divided by the river, existed at the time of the permanent settlement, and had since continued to exist.

“2. That the chur land, when twice settled with the Maliks of *Sohagpoor*, had been so settled with them on the ground that the river then ran in what has alone been called the southern channel, thereby making it an increment for the time being to their estate within the district of *Tirhoot*.

“3. That by reason of the change in the main channel of the river the land, of which they do not dispute the identity, had become an increment of the Maharajah's estate within the district of *Sarun*, and accordingly ought to be settled with him.

“4. That the right of occupancy of the Maliks of *Sohagpoor*, who are called lessees, ceased on the expiration of their so-called lease.

“The two principles then upon which the determination of the Board and therefore the title of the Defendant rests, are the existence of the alleged usage and the inference that by reason of that usage the antecedent interest of the Plaintiffs and their predecessors in the land was only of a limited temporary and conditional character.

“Their Lordships do not propose to go at length into the pleadings in the suit, which appear to them to have sufficiently put in issue the propositions of the Board of Revenue. They must remark, however, that the trial of the cause has been unfortunate, inasmuch as it has failed to determine these substantial questions. The suit came originally before a Principal Sudder Ameen who dismissed it first on a technical question of parties; and secondly,

on the ground that the orders of the Board of Revenue were conclusive and binding on the Civil Courts. On appeal, both these objections were overruled by a divisional Bench of the High Court, which remanded the case for trial on the merits, but in doing so unfortunately intimated an opinion that the question to be tried was "whether (with reference especially to clause 2 of sect. 4 of Regulation XI of 1825) the lands were the property of the Plaintiffs ; the Defendants alleging (with reference to classes 1 and 3 of the same section) that the lands were their property, having been acquired by gradual accretion to their estates." The opinion thus intimated clearly implies that the principal if not only questions between the parties were, whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause ; or, whether the recession of the stream having been gradual it had taken from the *Tirhoot* estate what had once belonged to it and given what is so took to the *Sarun* estate by accretion in the proper sense of the term. The High Court seems to have assumed that the Plaintiffs may once have had the permanent and proprietary interest in the lands ; and altogether to have ignored the existence of the alleged usage as an element in the case.

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" This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlements with the Maliks of *Sohagpoor* as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure ; he omitted to try the issue whether the usage existed in fact. And the greater part of the judgment is devoted to the consideration of the questions whether the change in the course of the river had been sudden or gradual, and whether the land in dispute was capable of identification as the land formerly held by the Plaintiff's or had formed by gradual accretion on the Defendant's estate. Deciding these questions in the Defendant's favour, he dismissed the suit. The cause then came again before a Divisional Bench of the High Court, which pronounced the decree now under appeal. The learned Judges differed from the findings of the Principal Sudder Ameen as to the gradual recession of the river, and the formation of the land in dispute. They

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held that the latter had been shewn to be identical with that which was formerly held under the temporary settlements by the Maliks of *Sohagpoor*, and had been the subject of adjudication in the Act IV, Case of 1849 ; and that it had been separated from *Sohagpoor* by the *Gunduck* causing a sudden disruption of the Plaintiffs' land. Their judgment assumes that the Plaintiffs had a permanent proprietary interest in the deara land settled with their predecessors in title ; and does not in any way deal with the question of usage.

“ On the argument of the appeal, the contention between the parties finally assumed the following form :—

“ The case of the Plaintiffs—who, coming to disturb the Defendant's possession, must establish their title to do so—was, 1st, that the deara land settled with them in 1837 was so settled with their predecessors in title as the proprietors of the alluvium which had formed on their estate, subject to the right of the Government to assess revenue thereon ; and that, though from its nature it continued to be subject to a fluctuating revenue, it thereupon became an integral part of their estate ; and, 2ndly, that this land having been separated from the rest of their estate by a sudden change in the course of the river, and remaining capable of identification, continued to be their property.

“ On the other hand, the case of the Defendant was, first, that the deara land had not been settled with the Maliks of *Sohagpoor* in 1837 as proprietors of the alluvium, but in conformity with the usage which made the main channel of the river the boundary of the two estates ; that such land had not been shewn to have been formed by gradual accretion on the *Sohagpoor* estate, which could alone give the Maliks of that estate a right to claim it as proprietors ; and that, by virtue of the alleged usage when the northern channel became, in 1847, again the main channel of the river, the deara land ceased to belong to *Sohagpoor*, and became part of the estate of *Doomree*, the temporary settlements having given to the Maliks of *Sohagpoor* at most only a right of occupancy during their subsistence. The Defendant moreover as their Lordships understood, did not abandon the defence founded on the findings of the Principal Sudder Ameen to the effect that the return of the river from the southern to the northern channel

had been gradual and not sudden ; that the lands in dispute were incapable of being identified as those settled with the Maliks of *Sohagpoor*, but had been formed by gradual accretion on the estate of *Doomree*, and were therefore an increment to that estate under the general law of alluvium.

“ Of this latter part of the Defendant’s defence their Lordships propose, finally, to dispose.

“ Upon a full consideration of the evidence they are of opinion that the High Court was right in holding that the land in dispute has been shewn to be identical with that which was the subject of the Act IV, Case of 1849, and therefore with that which was the subject of the settlements of 1837 and 1846 : and to have been separated from *Sohagpoor* by a sudden change in the course of the main stream of the river. They agree with the High Court in thinking that, on this latter point, the conclusion of the magistrate, formed when the change was recent, is to be preferred to that of the Principal Sudder Ameen.

“ The necessary consequence of this finding of their Lordships is that the Plaintiffs are entitled to follow their lands across the stream, under the 2nd clause of the 4th section of Regulation XI of 1825, unless they are prevented from doing so by force of the alleged usage, being a clear and definite usage within the meaning of the 2nd section of the Regulation ; or by reason of their never having had the proprietary right in the soil. Upon the latter point it was argued for the Defendant that the proprietary right in the soil may all along have remained in the Government ; which, though it made the two temporary settlements with the Maliks of *Sohagpoor*, may have retained and lawfully exercised the power of settling with the proprietors of *Doomree* on the expiration of the last of those settlements. Their Lordships, however, are unable to find in the settlement proceedings, or in the rest of the Record, any evidence that the Government ever asserted a title to the land as a chur thrown up in a navigable river, or as being wholly or in part the bed of the river. The first settlement certainly purports to have been made with the then Maliks of *Sohagpoor* in the character of “ proprietors ” of the alluvial land settled ; but, in their Lordships’ opinion, it is doubtful whether they were treated as proprietors by reason of the alleged

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usage, or because the deara land was supposed to have been formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the 1st or of the latter part of the 3rd clause of sect. 4 of Regulation XI of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The Proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favour it; though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen.

“ From what has been said above it plainly appears that the material thing to be determined in this case was the existence of the alleged usage. Yet the issue upon that point has never been tried. Their Lordships may observe that the admitted or proved existence of such an usage was the basis of the decision cited from the 1 Sudder Dewanny Adawlut decisions in the letter of the Board of Revenue; a case which, remarkably like the present in many of its circumstances, was decided many years before the passing of Regulation XI of 1825 upon the principles afterwards embodied in that statute.

“ Again, from what has been said above, it also appears that, in their Lordships’ opinion, some further inquiry is necessary touching the settlements of 1837 and 1846; the grounds upon which the Maliks of *Sohagpoor* were treated as the persons entitled to settle; and the nature of the proprietary interest in the alluvium then recognised in them. If it should clearly appear that the revenue officers then dealt with them as persons who had acquired a proprietary interest in the accretions under the provisions of clause 1 or 3 of section 4 of the Regulation, their Lordships are of opinion that this should be held to be sufficient evidence of their proprietary title. Their Lordships do not think that it would be right to cast upon them the burden of proving at this distance of time that the lands settled had, in fact, been formed by gradual accretion. If on the other hand it should appear that the alleged usage exists, and that the settlements were made on the basis of it, or that for any other reason the interests of

the Maliks of *Sohagpoor* in the same land was of a limited and temporary character, and had expired, that would be fatal to the Plaintiffs' suit. But these are questions for the determination of which their Lordships have not now before them the necessary materials.

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"Upon the whole then, their Lordships have reluctantly come to the conclusion that it is their duty to advise Her Majesty to reverse the decree under appeal, and to remit the cause to the High Court with instructions to cause the following issues to be tried; and to pronounce a decree according to the findings upon such issues in the manner provided by section 354 of the Code of Civil Procedure. The issues are—

"1st. Whether the land in dispute was settled in 1837 with the then Maliks of mouzah *Sohagpoor* as the proprietors of alluvium which had become an increment to their estate by gradual accretion; or upon what other grounds was such settlement made. The burden of proving the affirmative of the first part of this issue to be on the plaintiffs.

"2ndly. Whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River *Gunduck* should be the constant boundary, not only between the districts of *Sarun* and *Tirhoot*, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to lie on the Defendant (the Appellant). Each party is to be at liberty to produce such further evidence on these issues as he may think necessary; and their Lordships will also recommend that the costs of this appeal on both sides to be taxed, and the amount thereof certified to the High Court; and that it be part of the order that such costs be costs in the cause."

On the 16th of November, 1874, the subordinate Judge, after taking evidence, decreed both those issues in favour of the Plaintiffs.

Upon appeal by the Defendant the High Court reversed the finding of the subordinate Judge upon the first of those issues alone, and without finding on the second of them, directed the suit to be dismissed with costs.

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1879 *Doyne*, for the Appellants, contended that the Respondent had failed to prove the existence of any such clear and definite usage as under the second of the remanded issues he was bound to prove.

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It was clearly shewn that the settlements of 1837 and 1847 of the lands in suit were made with the Appellants according to the ordinary law governing the settlement of gradual accretions on original settled estates. Those lands were rightly treated as part of and increments to the Appellants' estate. The temporary character of those settlements was owing to the usual practice in such cases of the Revenue authorities, and their desire to ascertain before permanent settlement what is the highest revenue that can be fairly imposed on new and improvable lands, and did not imply any want of permanence in the proprietary right to those lands. He referred to *Harrington's Analysis*, vol. ii, p. 251; Regulation II of 1819, sect. 1; sect. 31, cl. 2, sects. 3, 7; *Baboo Bissessurnath v. Maharaja Bux Singh Bahadoor* (1).

Leith, Q.C., and *Cowie, Q.C.*, (*C.W. Arathoon* with them), for the Respondent, contended that the Appellants had failed to prove that the settlement of 1837 was made with their predecessors, the Maliks of *Sohagpoor*, "as proprietors of the alluvium which had become an increment to their estate by gradual accretion." The *onus* lay on them of doing so. The evidence, however, shewed that the two settlements of 1837 and 1847 were only of a limited and temporary character, and that the interest of the Maliks of *Sohagpoor* in the disputed lands was also of a limited and temporary character and expired when the particular period of settlement came to an end and was made by the revenue authorities on other and distinct grounds from those which it lay upon the Appellants to prove. Reference was made to *Raja Grieschund v. Maharajah Tezchund* (2).

Doyne replied.

The Judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The facts of this case are very clearly stated in the Judgment of their Lordships upon the remand in the year 1873. It is clear

that in 1837 a settlement of the lands in dispute was made with the predecessors of the Plaintiffs. That settlement was made at a revenue of Rs.84,200 3a. In 1847 the settlement was renewed, and the predecessors of the Plaintiffs continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1847. Prior to the renewal of that settlement in 1857 the River *Gunduck*, which was to the south of the Plaintiffs' zemindary and to the north of the Defendant's, had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it.

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A question arose as to the renewal of the settlement of 1847, and the lands being then on the south side of the river, which was the acknowledged boundary between the districts of *Sarun* and *Tirhoot*, were then in the district of *Sarun*. Mr. *Lautour*, who was the Collector of *Tirhoot*, and who had formerly settled the lands when they were on the north side of the river, and were then in his district, had some doubt whether he had jurisdiction, to re-settle them. The question was referred to the Commissioner, Mr. *Tayler*, who decided in favour of Mr. *Lautour*'s jurisdiction, and directed him to renew the settlement with the owners of the Plaintiffs' zemindary, *Sohagpoor*, upon which an appeal was presented to the Board of Revenue, and they ordered the settlement not to be made with the owners of the Plaintiffs' zemindary but with the owners of that of the Defendant on the southern side of the river. It is in consequence of that order that differences have arisen between the parties as to whether the Plaintiffs were entitled to a renewal of the settlement in 1857 or whether the Defendant was entitled to it.

The rule under the first clause of the fourth section of Regulation XI of 1825 is that land gained by gradual accession, whether from the recess of a river or of the sea, is to be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, "whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure by any description of under-tenant whatever." The Plaintiffs claimed that the lands in dispute were formerly an

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increment to their estate by gradual accession, and that they had been settled with the owners of *Sohagpoor* upon that basis. By the second clause of the fourth section the rule before mentioned was not to be considered applicable to cases in which a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment, or by the violence of its stream separates a considerable piece of land from one estate and joins it to another estate without destroying the identity and preventing the recognition of the land so removed. The change of the course of the river *Gunduck* on the last occasion was a sudden change, and the land which had originally been settled with the Plaintiffs on the north side of the river was capable of being identified on the south side of the river. Therefore this land which had been in the possession of the Plaintiffs for twenty years and had been brought into cultivation by them, did not, according to the 4th section of Regulation XI of 1825, belong to the owner of the zemindary on the south side of the river as having been gained by gradual accession. But a question arose whether in consequence of an established usage the river, however its course might be changed, was not to be considered as the boundary between the two zemindaries as it was between the two districts. The second section of the Regulation of 1825 was relied upon by the Defendant. By that section it was enacted that, " Whenever any clear and definite usage of Shekust pywust respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates, divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage." The Sudder Board of Revenue thought that there was a clear and definite usage that under all circumstances the river should be the boundary between the zemindaries on the one side and those on the other. They say, " At the time of the permanent settlement, and since then, there has been, the

Board observe, a distinct and clear usage that the main channel of the *Gunduck* should be the constant boundary between the two district of *Sarun* and *Tirhoot*, and between the zemindaries on each bank divided by the river." They accordingly ordered a settlement to be made with the Defendant, and in conformity with those directions a summary settlement of the lands, which are the subject of this appeal, was made with the Defendant, the Maharajah of *Hutwa*, who obtained possession of the lands. Thereupon the Plaintiffs, in January, 1860, commenced this suit. They contended that the lands having been settled as an accretion to their zemindary on the northside of the river were theirs by virtue of proprietorship; and that being capable of identification, notwithstanding the change of the river, the lands belonged to them under clause 2, sect. 4, of the regulation of 1825, and not to the Defendant; and then the question arose whether there was such a custom as that which the Board of Revenue stated, namely, a custom that the river should be the boundary, not only of the districts, but of the zemindaries on either side.

The Principal Sudder Ameen tried the case, and he dismissed the Plaintiffs' suit upon some technical objections, and also upon the ground that the decision of the Board of Revenue that the settlement should be made with the Plaintiff was final and conclusive. Upon appeal to the High Court they reversed that decision, and remanded the case to the Principal Sudder Ameen for re-trial.

The case afterwards came before this Board upon appeal, and their Lordships in their judgment of remand, alluding to the trial of the case by the Principal Sudder Ameen after the remand by the High Court, say; "The opinion thus intimated clearly implies that the principal if not the only questions between the parties were whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause, or whether the recession of the stream having been gradual, it had taken from the *Tirhoot* estate what had once belonged to it, and given what it so took to the *Sarun* estate by accretion in the proper sense of the term. The High Court seems to have assumed that the Plaintiffs may once have had the permanent and proprietary interest in the lands, and

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altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlement with the Maliks of *Sohagpoor*—that is, the Maliks of the zemindary on the north side of the river—“as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact. Their Lordships afterwards went on to say: “The first settlement certainly purports to have been made with the then Maliks of *Sohagpoor* in the character of proprietors of the alluvial land settled; but in their Lordships’ opinion it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the Dearly land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the third clause of Sect. 4 of Regulation XI of 1825. Their Lordships have not before them the whole settlement proceedings, and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favour it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried.” Their Lordships finally remanded the case in order that two new issues should be tried; first, whether the land in dispute was settled in 1837 with the then Maliks of mouzah *Sohagpoor* as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to be on the Plaintiffs. Secondly, whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River *Gunduck* should be the constant boundary, not only between the districts of *Sarun* and

Tirhoot, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to be on the Defendant."

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The case then went down and was re-tried upon those issues, and further evidence was given on the part of the Defendant to shew that there was such a usage. The Subordinate Judge, upon the evidence, found that no such usage had been proved; and he also found on the first issue that the settlement in 1837 was not made upon the ground of the alleged usage under section 2, Regulation XI of 1825, but on the ground of their proprietary title under the provisions of clause 1, section 4 of that Regulation, that is to say, that the land was settled in 1837 with the owners of *Sohagpoor* as the proprietors of alluvion which had become an increment to their estate by gradual accretion. An appeal was preferred from that judgment to the High Court, and that Court overruled the decision of the Lower Court upon the finding on the first issue, and they abstained from coming to any conclusion upon the second issue. There certainly is no sufficient evidence to justify their Lordships in finding that there was such a clear and definite usage as that stated in the second issue, and in overruling the decision of the Lower Court upon that issue upon which the High Court have expressed no opinion.

Mr. Justice *Kemp*, one of the learned Judges of the High Court who decided the case upon appeal, held that the Subordinate Judge was wrong in finding that the lands had been settled with the owners of *Sohagpoor* in 1837 upon the ground of their proprietary title under clause 1, section 4 of the before-mentioned regulation. In his judgment he does not quite accurately state what the issue really was. Speaking of their Lordships' judgment on remand, he says: "They then remark, 'that if it should appear that the alleged usage, that is, the usage set up by the Defendants, namely, that the River *Gumduck* is the boundary between the two zillahs of *Sarun* and *Tirhoot*, exists, and that the settlements were made on the basis of that usage, or (and these observations are very important) for any other reason the interest of the Maliks of *Sohagpoor* in the land in dispute was of a limited and temporary character and had expired, that would be fatal to the Plaintiff's suit.'" There was no doubt that the

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river was the boundary between the two zillahs of *Sarun* and *Tirhoot*; but the real question was whether there was a clear and established usage that that river should be the constant boundary between the zemindaries on either side. That was the question as to usage which their Lordships intended to be decided.

On reversing the decision of the Lower Court upon the first issue, Mr. Justice *Kemp* says: "Then comes the document, which is a proceeding of the Deputy Collector of *Tirhoot*, Mr. *Edward De Rozario*, dated the 28th of November, 1837. He saye that, 'Having held a local inquiry and examination I effected a temporary settlement for seven years from 1245 to 1251 Fusli, with *Jugdeo Narain*, the proprietor of the bureri lands above mentioned,' that is, the lands of *Sohagpoor*." That does not affect the case at all. He merely says that he had made a temporary settlement with the owners of *Sohagpoor*. Mr. Justice *Kemp* proceeds, "Then follows a copy of the report of the same officer, viz., Mr. *Edward De Rozario*, the Deputy Collector of *Tirhoot*, to his immediate superior, Mr. *Campbell*. Before referring to this report we notice a passage in the settlement proceeding of Mr. *De Rozario*, where he says 'The proprietors of mouzah *Bhukain*, etc., pergunnah *Goa*, zillah *Sarun*, were given to understand that a settlement of the land that has accreted from the *Gunduck* cannot be made contrary to the line of demarcation, namely, the River *Gunduck*.' Returning to the report of Mr. *De Rozario*, submitting his proceeding to his immediate superior, we find that the petition of the Maliks of *Bhukain*, in which they had claimed for an exception to the established usage of the recognised boundary of the main channel of the *Gunduck* to be made in their favour, was opposed to all regulation and was inadmissible." Those two documents are set out in the present record, in the first of which Mr. *Rozario* says, "Therefore the proprietors of mouzah *Bhukain*, etc., pergunnah *Goa*, zillah *Sarun*, were given to understand that a settlement of the land that has accreted from the *Gunduck* cannot be made contrary to the line of demarcation, namely, the River *Gunduck*." He does not say that a clear and definite usage existed that the River *Gunduck* was to be the boundary between the two zemindaries. The other document to which the learned Judge refers is contained in a letter to Mr. *Campbell*, who was the Deputy

Collector in charge of *Khas* and resumed mehals in *Tirhoot*. That letter was dated the 16th of February, 1838, and contains the passage to which the learned Judge refers : " The petition of the Maliks of *Bukain* etc., zillah *Sarun*, for exception to the established boundary of the main channel of the *Gunduck* in opposition to all regulation was inadmissible, and their unfounded officiousness pointing out the permanently assessed land as portion of the alluvion from a puerile motive." To say the least of it, it is very ambiguous what was meant by that statement. But in the last paragraph of that letter, he says : " These lands established as an alluvion of the estate registered in the name of *Futteh Sing*, descending on his demise to his sons *Gunga Persad* and *Jugdeo Narain Sing*, with the latter as the surviving proprietor, I have, under Regulation XI of 1825, effected a temporary settlement for seven years, from 1245 to 1251 Fusli inclusive, on the Sudder jumma of Sicca Rupees 789 9, or Company's Rupees 842-3a-2p., which I now have the honour to submit to your approval." If Mr. *De Rozario*, had relied upon a clear and established usage that the river was, under all circumstances, to be the boundary between the two zemindaries, it was unnecessary to say that it had been established that the lands were an alluvion of the estate, etc. It would have been sufficient to say they are to the north of the river, and consequently, according to the established usage, are part of the zemindary on the northern side of it. It appears, therefore, to their Lordships that the lands were settled with the predecessors of the Plaintiffs as an alluvion of their estate, and that, as far as the statements in the letters go, they do not establish that it was made with the Plaintiff upon the ground of there being an ancient and established usage that under all circumstances the River *Gunduck* should be treated as the boundary between the two zemindaries. Having referred to those documents, Mr. Justice *Kemp* proceeds to say that the settlements were merely temporary. He says, " These are all the proceedings of any importance with reference to the first temporary settlement made with the Plaintiffs by the revenue authorities. The second settlement was made for ten years with the Plaintiff, from 1846 to 1856, by Mr. Deputy Collector. At page 45 will be found the proceeding of that officer with reference to this second temporary settlement made with the Plaintiff. That proceeding was before

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their Lordships of the Privy Council." It does not appear that the second settlement at all affected the case ; it was merely a renewal of the settlement of 1837, and if the settlement of 1837 had been made on the principle of established usage, the second settlement followed upon the ground of that usage. If, on the contrary, it was made with the Plaintiff as the proprietor of an estate to which the lands had become an accretion by gradual accession, then the second settlement was made upon the same principle. Mr. Justice *Kemp* proceeds, "The next proceeding is at page 55. This was not before the Privy Council, but was subsequently filed after the remand by the Plaintiffs. It is merely a letter of the Collector forwarding the proceedings connected with the temporary settlement concluded with the Plaintiffs. But a passage has been referred to in it by the pleader for the Plaintiffs in which the Collector says that a settlement has been concluded for a period of ten years with the heirs of *Gunga Persad* and *Jugdeo Narain* as Maliks of the *Kurrari Mehal*." That shews that the settlement was made with them, not in consequence of any known and established usage, but upon the ground of the ordinary rule under Regulations XI of 1825. Then he says "Having reviewed the documents filed by the Plaintiffs both before and after remand, we come to the decision upon the first issue laid down by their Lordships of the Privy Council ; and as after a careful consideration we have come to a conclusion different to that which the Subordinate Judge has arrived at, we shall confine our decision to the finding on the first issue laid down, inasmuch as we consider it unnecessary to enter into the second issue laid down by their Lordships of the Privy Council. We are of opinion that the settlements made with the Plaintiffs were temporary settlements, and were made on the basis that the *Gunduck* was the boundary line, not only of the two zillahs *Sarun* and *Tirkoot*, but of the estates appertaining to those districts ; that the land in dispute was settled with the Plaintiffs on temporary leases, and that those settlements were of a limited and temporary character. Such being the case, to use the words of their Lordships, this finding is fatal to the Plaintiffs' suit."

With reference to the settlements being of a temporary character, we must consider what the law is upon the subject. If this

accretion belonged to the Plaintiffs by virtue of the first clause of sect. 4 of Regulation XI of 1825 as lands which had been gained by gradual accession to their estate, then by virtue of the first clause of that section it became an increment to the Plaintiff's estate, and the property became his property. The words are :

" When land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landowner, or as a subordinate tenure of any description of under-tenant whatever ; provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation XI, 1819, or of any other regulation in force." Assume it to be a case within this section, the land became the property of the predecessors of the Plaintiffs liable to be assessed by the Government for revenue ; but there was no obligation on the part of the Government to assess it permanently, nor would it have been proper to do so, because at the time when it was first annexed it was mere sandy soil scarcely culturable, and was so reported by Mr. *D Rozario*. In his report he says : " At first he"—that is, *Jugdeo Narain Singh*, the Plaintiffs' predecessor—" raised a number of pleas as to his inability to pay the rent,"—that is, the revenue—and that the diara will not remain in existence, owing to the force of the River *Gunduck*. Upon this he was made to understand that the whole of the land is somewhat like a sandy desert, and, of course, after the lapse of some time it will become culturable, and yield a great profit." Then he assented to take it at the revenue, which the Government fixed at the time, of Company's Rs. 842, and began to cultivate it ; but the Government only assessed temporarily that which was his permanent property. A temporary assessment did not reduce to a temporary estate, or to an estate of

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J. C. a limited and temporary character, the interest of the Plaintiffs in
 1879 the accretion, which was permanent, as being an increment to an
RUGHOOBUR estate which was permanent, but it merely fixed the period during
 DYAL which the increment should be subject to the revenue of Rs. 832,
 SAHOO so that the Government at the expiration of the settlement might
 v. MAHARAJAH be at liberty to raise it according to the value of the land. At the
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 at a revenue of Rs. 1,500. The land had then become improved.
 The Plaintiffs remained in possession of the land under temporary
 settlements from the year 1837, for a period of nearly twenty
 years, down to the year 1857, and during the whole of that time
 they paid revenue to Government, partly during the time when the
 land was little better than a sandy desert. The plaintiffs and their
 predecessors cultivated the land, and so improved it that in 1847
 it was assessed at Rs. 1,500. The Plaintiffs were during twenty years
 in occupation of the land, when at the expiration of the settlement
 of 1847, in consequence of a sudden turn of the River *Gunduck*, it
 was on the southern side of the river capable of being identified,
 and still belonged to the Plaintiffs, unless there was a clear and
 definite usage that the River *Gunduck* was to be the boundary,
 not only between the two districts, but between the zemindaries
 on either side.

Such a custom has not been proved ever to have existed. The
 Subordinate Judge has found that there was no such usage. The
 High Court has not considered the evidence or reversed the
 finding of the Subordinate Judge upon the second issue, and their
 Lordships are of opinion that the alleged usage was not made
 out. The usage not having been proved, their Lordships are of
 opinion that there was no sufficient evidence to justify the finding
 of the High Court that the revenue settlements were made on the
 basis that the River *Gunduck* was the boundary line not only of
 the two zillahs, *Sarun* and *Tirhoot*, but of the estates appertaining
 to those districts; on the contrary, they are of opinion that the
 settlements, though temporary, were made with the predecessors
 of the Plaintiffs as an alluvion to the estate of *Sohagpoor*, which in
 1837 was registered in the name of *Futteh Singh*, and upon the
 ground that the predecessors of the Plaintiffs were the Maliks and
 proprietors of the estate, and consequently that the finding of the

Lower Court upon the first issue under the remand from this Board was a correct finding, and that the reversal of that finding by the High Court was erroneous.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that it be declared that the Plaintiffs are entitled to the lands in dispute, and to have a settlement made with them, and that it be ordered that the Plaintiffs do recover possession of the said lands, with mesne profits from the date of the institution of the suit, such mesne profits to be assessed in execution of the decree; and that the Respondent do pay the Plaintiffs the costs in all the Lower Courts and the costs of the former appeal to Her Majesty in Council as already taxed as part of the costs in the cause; and their Lordships order that the Respondent do pay the costs of this appeal.

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—

Agents for the Appellants : *Henderson & Co.*

Agents for the Respondent : *J. L. Wilson.*

BISSESSUR LALL SAHOO PLAINTIFF ; J. C.*

AND

MAHARAJAH LUCHMESSUR SINGH . . DEFENDANT. *July 9, 15,*

A MINOR UNDER THE COURT OF WARDS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law—Purchase with Joint Funds—Execution.

A purchase by a member of a Hindu Joint family with the joint funds is a purchase on account of the joint family, and property so bought may be taken in execution for a joint family debt.

In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

APPEAL from a decree of the High Court (Sept. 14, 1876), reversing a decree of the Judge of *Tirhoot* (Jan. 13, 1875).

* Present :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

J. C. The facts of the case are stated in the judgment of their
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Doyne, for the Appellant, contended that the burden of proving that *Nath Dass* had an interest in mouzah *Muddunpore* should have been placed on the Respondent, and that the weight of evidence was against the existence of such interest. He referred to *Doolarchund Sahoo v. Lalla Chand* (1). As regards the interest of *Mosahib Dass* in the surpluses of sale proceeds, the suit was not barred by sect. 11 of Act XXIII of 1861. The heir of *Nath Dass* was sued in the former suit in his representative capacity. His claim now is in his individual capacity. That is not a question arising between the parties to the former suit within the meaning of sect. 11. Reference was made to *Ameeroonissa Khatoon v. Meer Mahomed Chowdhry* (2); *Chowdhry Wahid Ali v. Mussamut Jumæe* (3), a Privy Council decision decided June, 1872, and to *Abedoonissa Khatoon v. Ameeroonissa Khatoon* (4).

Cowie, Q.C., and *Graham*, for the Respondent, contended that the question raised in this suit should have been raised by *Mosahib Dass* and *Chooman Lall Dass* in the Court charged with the execution of the decrees; and that the same not having been so raised, the suit was barred by sect. 11 of Act XXIII of 1861. Reference was made to *Ishan Chunder Mitter v. Buksh Ali Soudagur* (5); *General Manager of Raj Durbhunga v. Maharajah Coomar Ramaput Singh* (6).

Doyne, replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

The points to be decided in this case arise in this way: One *Nath Dass* died in the year 1853 leaving a son, *Ramnath Dass*, who died in the year 1855; and *Ramnath Dass* left two sons, *Mosahib* and *Chooman*. The Rajah of *Ramnugger*, as he has been

(1) Law Rep. 6 Ind. Ap. 47.

(2) 20 Suth. W. R. 280.

(3) 18 Suth. W. R. 185.

(4) Law Rep. 4 Ind. Ap. 287.

(5) Marsh. Rep. 614.

(6) 14 Moore's Ind. Ap. Ca. 605.

called in the argument,—that is to say, the guardian of the infant Rajah of *Ramnugger*—brought three suits in the year 1862 in respect of rent due from members of the family of *Mosaheb* and *Chooman*. In the first suit the judgment was given on the 22nd of March, 1862, and it seems that the Plaintiff in that suit sued the widow of *Nath Dass* and the widow of *Ramnath Dass* as guardians of two young men who are assumed to be *Mosaheb* and *Chooman* under other names. The claim was for the recovery of rent, about Rs.3000 odd, which amounted to about Rs.8000 with interest and costs, and the statement is that *Nath Dass* and *Ramnath Dass* took a lease of a certain mouzah *Rudarpore*, and that the rent accrued in respect of that mouzah. Then it is ordered “that this decree will not be executed against the person and self-acquired property of the judgment-debtors, but it will be executed against the property left by the deceased leaseholders.”

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Upon this judgment execution was issued against a certain mouzah *Muddunpore*, which appears to have been bought in the year 1847 in the name of *Ramnath Dass*. Whether it was bought by *Ramnath Dass* for himself and separately, or as a member of the joint family, is a question to be hereafter discussed.

There were two other judgments, the nature of which will be subsequently referred to, dated respectively the 9th of April, 1862, and the 16th of April, 1862, whereby large sums were decreed beyond the Rs.8000 which was obtained by the first decree ; and an order was obtained by the Plaintiff empowering him to put up mouzah *Muddunpore* for sale in satisfaction of all three decrees. This was done, and it was bought in by the Plaintiff at, in round numbers, Rs.35,000. *Mosaheb* and *Chooman* made no objection to this proceeding at the time, or indeed at all ; but some three years afterwards they sold to the Plaintiff in this suit their right to recover the difference between the Rs.8000, the sum obtained by the first decree, and the Rs.35,000 for which *Muddunpore* was sold ; that is to say, they claimed to recover the sum which mouzah *Muddunpore* was charged with in execution of the last two decrees ; and whatever rights they had the Plaintiff has, neither more nor less.

It is necessary in the first place to advert to what was the main contention in the case. It was contended on the part of the Plain-

J. C. tiff that the family of *Nath* and *Ramnath* became separate about
 1879 the year 1839. It was alleged that at that time there was a
 BISSESSUR quarrel between *Ramnath Dass* and his father, and that they ceased
 LALL SAHOO to be joint in food. But on the part of the Plaintiff there was
 MAHARAJAH scarcely any evidence of separation of estate; in fact, on his own
 LUCHMES- case, there was some evidence that there was no separation in
 SUR estate, and that *Ramnath Dass* acquired no separate property.
 SINCH. The first Court held that the separation had been proved, and that
 mouzah *Muddunpore* was bought by *Ramnath Dass* for himself
 and with his own property, although it certainly does not appear,
 according to the evidence of the Plaintiff, how he could have
 obtained the funds for purchasing it. The High Court reversed
 the decision on this point of the Lower Court, and came to the
 conclusion that the family was joint and had never separated; and
 their Lordships agree with the High Court.

This being so, the consequence follows, as has been laid down
 before in the very well-known case of *Gopeekrist Gosain v. Gungapersaud Gosain* (1), that the purchase of *Muddunpore* by
Ramnath Dass would be assumed to be a purchase, not on his own
 account, but for the joint family, and that *Muddunpore* would be
 joint family property.

It now becomes necessary to examine the two decrees subsequent
 to that of the 22nd of March, 1862, with respect to which there
 is no dispute. The next decree is dated the 9th of April, 1862,
 and in that suit *Mosahib Dass* is sued as the heir of *Nath Dass*,
 and the decree is for the recovery of Rs.39,000 on account of the
 rents of a certain mouzah *Ramnugger*, and it is stated that *Nath Dass*
 had taken a lease of that from 1847 to 1854. Then it
 is further orderd that this decree is not to be executed against
 the person and self-acquired property of the Defendant, but
 against the property left by the deceased leaseholder *Baboo Nath Dass* only.

It appears to their Lordships that acting on the principle which
 follows from their finding that this family was joint, it must be
 assumed that *Mosahib Dass* is sued as a representative of the
 family, and that it must further be assumed that *Nath Dass* in
 taking the lease of the mouzah here referred to—*Ramnugger*, in

respect of which the rent was due—must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. With respect to the order, as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is that the decree is not to be executed against the self-acquired property of *Mosaheb*, but against the family property which is there described as that left by *Nath Dass* for the purpose of distinguishing it from the separate property which may have belonged to *Mosaheb*. The only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that *Muddunpore* was a part of that joint property.

The same reasoning applies to the third decree, although curiously enough the action seems to have been brought against the widow as the guardian of *Mosaheb*. Here there is the same direction with reference to the property, but substantially the same observations apply which have been applied to the former decrees.

Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property. Their Lordships have therefore come to the conclusion that the High Court has been right in dismissing the appeal from the Lower Court.

This being their Lordships' view of the case, they do not think it necessary to go into the questions which were touched upon but not decided by the High Court, whether the vendors of the Plaintiff, or either of them, were bound to dispute the sale of mouzah *Muddunpore* in the execution proceeding, and whether the Plaintiff was in consequence debarred from bringing this suit.

Two cases have been referred to, *Ishan Chunder Mitter v. Buksh*

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J. C. Ali Soudagur (1), *The General Manager of the Raj Durbhunga v.*
1879 *Maharjah Coomer Ramaput Singh* (2), the effect of which may
be stated thus : that in execution proceedings the Court will look
at the substance of the transaction, and will not be disposed to set
aside an execution upon mere technical grounds when they find
that it is substantially right.

Under these circumstances their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

Agent for Appellant: *T. L. Wilson.*

Agent for Respondent : *H. Treasure.*

J. C. *

SAMEER MULL AND CHUNDER MULL . PLAINTIFFS ;
AND

July 18.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF AJMERE, CENTRAL PROVINCES.

Principal and Agent—Guarantor—Customer—Liability

In a suit to recover Rs.14,000, which the Plaintiffs alleged that they had paid as guarantors of the Defendant, being the loss sustained by his vendors in consequence of the fall of the price of certain cotton sold, it appeared that, by a local custom, the Defendant, as a stranger in the locality of *N.*, could only trade through a resident merchant, the name of whom is by the custom entered as principal in the transaction, to whom the credit is given, and with whom the final settlement of the transaction is effected as the "arath" of such stranger ; that the Defendant made extensive transactions in *N.* through the plaintiffs, representing them as his "araths," and delivered to them "panris," or memoranda of the transactions, according to the custom ; that in respect of the transaction in question the Defendant did not deliver a panri to the Plaintiffs (though he had made use of their names), and that the Plaintiffs had represented to the vendors that, not holding a panri, they

* *Present* :—SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

could not render themselves responsible, but that on reference to a punchait, it was decided that the Plaintiffs ought to pay, and they did pay, the said Rs. 14,000 to the vendors :—

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Held, that the Defendant was liable. He had the authority of the Plaintiffs to use their name, had so used it with their concurrence, and had thereby authorized the payment as aforesaid by the plaintiffs, who according to the custom were undoubtedly liable to the vendors.

APPEAL from an order of the Judicial Commissioner of *Ajmere* (April 3, 1876), reversing an order of the Commissioner of that city (May 13, 1875), and upholding that of the Deputy Commissioner (October 7, 1874).

The Appellants brought their suit to recover Rs. 13,600 with interest, which they, as the Respondent's agents, had paid to various merchants in order to settle dealings in cotton which had been entered into between those merchants and the Respondent.

The plaint alleged "that the firm of the Plaintiffs at *Nyanuggur* was a commission agency for the Defendant, and that through the firm at *Nyanuggur* the Defendant personally and through his agents transacted business in cotton and other articles, and the Plaintiffs, according to the mercantile practice, had to pay in lieu of such transactions made by Defendant, and the Plaintiffs called upon the Defendant by letters and messengers to settle the account, but the Defendant would not do so."

The custom or mercantile practice is stated in their Lordships' judgment.

The defence was that the particular transaction, the subject of the plaint, which related to 14,250 maunds of cotton, had not been entered into by the Respondent nor his agents : that the Appellants as an invariable rule received a written authority (*panri*) from the Respondent ; that without such written authority the Respondent was not answerable ; that subsequent to the said transaction the Appellants' gomasta was with the Respondent with their account, when no mention of the purchase of it was made, nor was the same entered in their books.

The facts are stated in the judgment of their Lordships.

The judgment appealed from was as follows :—

"The point for determination, therefore, is whether there has been established any rule of law or custom, by which upon the

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circumstances set forth in the evidence, *Sameer Mull* is entitled to to recover from *Chogalall* the amount which the *Nyanuggur* brokers forced *Sameer Mull* to pay to them. It is quite plain that *Sameer Mull* did not pay the brokers in compliance with any custom admitted to be binding on him, or in reliance upon any supposed right to recover his money from *Chogalall*, but that he paid simply and solely by reason of the pressure put on him by the brokers united. He, *Sameer Mull*, at first declined altogether to admit his liability to the brokers, alleging that he had had no instructions from *Chogalall*, and was in no way responsible for the transaction. In fact, there can be no doubt that *Sameer Mull* believed himself not to be liable under any rule a Court would recognise, and that the brokers were of the same opinion, for they did not choose try their claim in the Courts, but used other means, which *Sameer Mull* did not choose to resist. This being the case, under what rule of law or custom is *Chogalall* liable to *Sameer Mull*?

" It is my opinion that no such rule has been established. The Lower Appellate Court appears to hold that the previous dealings between the parties had been of such a nature that *Sameer Mull* had become, whether he liked it or not, a guarantor of any cotton dealings that *Chogalall* might have carried on personally, and without special notice or written instructions to his guarantor, within the *Nyanuggur Bazaar*.

" I can find no evidence to warrant such a conclusion. The custom of the Bazaar, as between the cotton broker and the resident firm which is supposed always to guarantee their sales to a non-resident purchaser, is very carefully stated by the Commissioner's report to the original Court after inquiry under sect. 180, *Civil Procedure Code*. And to me it appears evident that, according to the custom there stated, the brokers would have had great difficulty in recovering from *Sameer Mull* upon the transaction of 10th Bhadon with *Chogalall*. But if they could have so recovered in the Courts they might have brought their suit, when the point would have been fairly tried. Instead of this, the composition money is paid by *Sameer Mull*, who has now managed to induce the Lower Courts to try, upon a suit between him and *Chogalall*, the issue whether he was or was not legally responsible to the

brokers. Whereas, the real question in this suit is not whether *Sameer Mull* was responsible to the brokers, though here I should hold he was not ; but whether *Sameer Mull* was authorised directly or implicitly by *Chogalall* to guarantee his transactions of the 10th Bhadon, 1927. As I can find no evidence that *Sameer Mull* had received special instructions or authority to guarantee this transaction, or that he had any reason for supposing that *Chogalall* considered him to be guarantor in the transaction, or that he even did guarantee the transaction, I reverse the decree of the Lower Appellate Court, and direct that the Plaintiffs' original suit be dismissed."

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Cowie, Q.C., and *C. W. Arathoon*, for the Appellants, contended that the Appellants were the Respondent's *del credere* agents and guarantors at *Beawar*, and recognised and acknowledged as such by the *Beawar* traders and brokers. The Respondent purchased with full knowledge that according to the custom he could not have effected it in his own name, but only in that of a known resident. During the transactions in dispute the Respondent was present and himself made the bargains in the name of the Appellants. They assented to it or subsequently ratified it, and were consequently themselves liable without delivery of the panri. They accepted the liability on behalf of the Defendant, have paid the amount, and are now entitled to recover it.

Leith, Q.C. (Mayne with him), for the Respondent, contended that the judgment of the Judicial Commissioner was correct, and that the custom relied upon was not proved, and at any rate was void and illegal. There was a conflict of evidence as to whether the sending of a panri was a condition precedent to the existence of any liability on the part of the arath for the dealings of a third party ; but, at all events, some communication from the principal to the arath of a dealing having been effected in his name was clearly necessary. The payments by the Appellants were voluntary payments, and were not made in pursuance of any contract with the Respondent or of any legal liability to the trader.

The appellants were not called upon to reply.

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SAMEER
MULL AND
CHUNDER
MULL
v.
CHOGALALL

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

Although this case has undergone several lengthened investigations, it appears to their Lordships that the facts material to its decision lie in a small compass. The plaintiffs are bankers carrying on business at *Ajmere*, and also at a place called *Beawar*, which is also at times called by another name, *Nyanuggur*. The Defendant is a merchant at *Nusserabad*, and the transaction out of which this appeal arises is a purchase of a quantity of cotton at *Beawar*. It appears that at *Beawar* there is a custom which seems to their Lordships to be fairly stated in the case of the Respondents. That case says : “ There is an admitted custom prevailing at *Nyanuggur*, according to which a merchant coming from any other district is only allowed to trade in the name and upon the credit of a *Nyanuggur* firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of a *Nyanuggur* merchant is given, and his name is entered as the principal in the transaction. Credit is given to him, and the final settlement of the transaction is effected with him. He is known as the arath or agent. At the conclusion of such transaction a memorandum of it is sent to the arath by the person who makes use of his credit. This memorandum is known by the term ‘panri.’ ” It appears that towards the end of August 1870, about the 24th or 25th, the Defendant came to *Beawar* for the purpose of extensively dealing in cotton. He remained there ten days, and during nine days he effected a number of purchases according to this custom, which he may be assumed to have been fully acquainted with, and used the Plaintiffs as his “ araths ” in the sense in which that term has been used in the description of the custom given in the Respondent’s case. These transactions, extending over nine days, amounted to as much as 6,025 maunds of cotton ; and with reference to all of these purchases, the Defendant being on the spot vouched the Plaintiffs, who were also on the spot, and they must be taken to have perfectly well known that he represented them as his “ araths ” according to the custom.

There is no dispute with respect to these previous transactions, which form a continuos series of dealings, but the dispute arises

with respect to the last transaction in which the Defendant was engaged. On the night of the tenth day of his sojourn at *Beawar* the Defendant entered into another transaction of a similar character, but larger in amount, whereby he purchased of various persons in the market as much as 14,000 maunds of cotton, employing the same brokers as before, and referring again to the Plaintiffs as his araths or guarantors. It further appears that the Plaintiffs, or at all events their agents, were at the time in the bazaar, and one of the Commissioners who made investigations into this subject observes that from the evidence recorded he is inclined to believe that they were cognizant of the proceedings or took part in them. The Defendant suddenly left *Beawar* on the next morning : he sent a "panri," which has been described as a memorandum of the transaction,—it does not exactly appear when, but probably very soon after,—to the Plaintiffs, in which he acknowledged his liability as far as the 6,025 maunds were concerned, but in which he took no notice of this last transaction. Thereupon the sellers applied to the Plaintiffs, as guarantors, to make good the purchase-money, and the Plaintiffs undoubtedly at that time said that as they had not had a panri they could not hold themselves responsible. It appears that a dispute arose, and subsequently the matter was referred to a punchait, and this punchait determined that the Plaintiffs ought to pay to the vendors of the cotton the sum of one rupee per maund, amounting to 14,000 rupees, being the loss sustained by the vendors in consequence of the fall of the price of cotton, and for that sum they bring this action against the Defendant.

The case has come before three commissioners, the Deputy Commissioner, the Commissioner, and the Judicial Commissioner. The first commissioner found in favour of the Defendant, the second in favour of the Plaintiffs, the third in favour of the Defendant ; and from the last judgment the appeal is preferred.

It appears to their Lordships that the result of the evidence and of the findings which have been come to by the Assistant Commissioners who were deputed to investigate the case is, that the Defendant in the contract for the purchase of the 14,000 maunds used the name of the Plaintiffs, and that the vendors sold to him on the credit of that name : and further, that the

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Defendant had the authority of the Plaintiffs to use their name. The Plaintiffs' name had been used with their full concurrence in a number of transactions during nine successive days ; they were present, or some of their agents, when this further transaction of the same kind was entered into, and it appears to their Lordships a fair inference that they were cognizant of and allowed their name to be so used in the last transaction, as they had in the others. If so, they were undoubtedly liable, according to the custom, to the vendors, and they would be entitled to recover over what they paid against the Defendant.

But it further appears to their Lordships that if there was no actual authority at the time, still that the Defendant having used the name of the Plaintiffs as his guarantors, and treated them and held them out as liable to pay on his behalf the price of this cotton, thereby authorized them, if they thought fit, subsequently to make that payment on his behalf. They may not unnaturally have at first hesitated to undertake the responsibility and endeavoured to avail themselves of the absence of a panri, still when they subsequently made the payment, not indeed of the whole amount, but such as had been arrived at upon a reference to a kind of arbitration, they were entitled to treat the use of their name by the Defendant as an authority to make that payment on his behalf, and the Defendant cannot dispute their right to do so. In other words, they had a right to ratify the use which he had made of their name, and they have not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.

Under these circumstances their Lordships are of opinion that the judgment of the Judicial Commissioner was erroneous, and they will humbly advise Her Majesty that that judgment be reversed, and that the judgment of the Commissioner of Ajmere be affirmed with the costs of this appeal.

Agent for the Appellants : *T. L. Wilson.*

Agents for the Respondents : *Burton, Yeates, & Hart.*

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ABANDONMENT OF CONFISCATION: *See* LORD CANNING'S PROCLAMATION, EFFECT OF.

ACCRETION BY GRADUAL ACCESSION.] The lands in suit (in *Tirhoot*) were settled under Regulation XI of 1825, sect. 4, cl. 1, with the Plaintiffs' predecessor in 1837, as the proprietors of an estate to which the lands had become an accretion by gradual accession, and the Plaintiffs continued in possession thereof till the expiration of the settlement in 1847, which was made on the same principle. Prior to the renewal of that settlement in 1857, the river, which was to the south of the Plaintiffs' zemindary (in *Tirhoot*) and to the north of the Defendant's (in *Sarun*), had suddenly and so completely changed its course that the lands in suit, which were formerly on the north side of the river, were capable of being identified on the south side of it, and were notwithstanding summarily settled with the Defendant, who obtained possession of them:—*Held*, that in the absence of proof of usage within the meaning of sect. 2 of the Regulation, that the river should be not merely the boundary between the two districts of *Tirhoot* and *Sarun*, but also the boundary between the two zemindars, the Plaintiffs were entitled to the lands. **RUGHOOBUR DYAL SAHOO v. MAHARAJAH KISHEN PERTAB SAHEE** 211

ACT I OF 1869.] In a suit brought (1865) by some members of a joint Hindu family for a declaration of right against another member thereof, it appeared that although the Defendant, being kabooliatdar of a certain talook in *Oudh* on behalf of the joint family, had obtained in his own name a sunnud thereof, and of certain villages granted by the Government as a reward for services rendered by the family during the mutiny, yet that from his acts and declarations he must be deemed to have consented to hold the same in trust for the joint family and as a joint estate, subject to the law of the Mitakshara:—*Held*, that Act I of 1869, which was passed before the suit was decided by the Court of first instance, did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate. The estate in his hands remained thereafter subject to the trust, and there can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable

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ACT V OF 1843, sect. 3 : See MAHOMEDAN LAW.

ACT VIII OF 1859, sect. 32.] A suit will lie to recover dues for certain religious services performed; and if to determine the right thereto it becomes necessary to determine incidentally the right to perform certain religious services, the Court has jurisdiction to do. **TIRU KRISHNAMA CHARIAR v. KRISHNAMA TATA CHARIAR** 120

— — — — — *See EXECUTION.*

— — — — — *Sects. 308, 310 : See PRACTICE.*

ACT VIII OF 1869, Sects. 59, 60, 66 : See EXECUTION.

ACT IX OF 1871. Schedule.] The provision in the schedule to the *Statute of Limitations*, 1871, wherein it is enacted that with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is “the date of the adoption or (at the option of the Plaintiff) the date of the death of the adoptive father,” does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued. **RAJ BAHADOOR SINGH v. ACHUMBIT LAL.** 110

ACT XIV OF 1859, sect. 1, sub-sect. 13 : See LIMITATION.

ACT XX OF 1866, sect. 17 : See REGISTRATION.

ADOPTION : See ACT IX of 1871.

AGREEMENT BY ADOPTIVE MOTHER WITH NATURAL FATHER IN DEROGATION OF THE INFANT ADOPTED SON'S RIGHTS : See HINDU LAW. 2.

ARTIFICIAL WATERCOURSE.] The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to

ARTIFICIAL WATERCOURSE—*continued*

the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.—*Wood v. Waud* (3 Ex 748; 18 L. J. (Ex. 305) approved.—*Held*, in this case that the Plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the Defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the Defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. *RAMESHUR PERSHAD NARAIN SINGH v. KOONJ BEHARI PATTUK* 33

CAUSE OF ACTION : *See* ACT VIII of 1859, sect. 32.

CLAIM TO MAINTENANCE : *See* LIMITATION, **CONFISCATION IN OUDH EFFECT OF.**] The effect of Lord Canning's proclamation of the 15th of March, 1858, was to divest all the landed property from the proprietors in *Oudh*, and to transfer it to and vest it in the British Government. Consequently all who since that date claim title to such property must claim through the Government.—Where a re-grant is made to a former owner the new title will depend entirely on the terms of the re-grant, and if such re-grant is made for life only, no suit can be maintained to rectify an alleged mistake, and for declaration of an absolute title according to the tenor of the sunnuds by which the property was held under the old dynasty and prior to the confiscation. *NAWAB MALKA JAHAN SAHIBA v. DEPUTY COMMISSIONER OF LUCKNOW* 63

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DAUGHTER'S INHERITANCE FROM HER FATHER IS NOT STRIDHUN : *See* HINDU LAW.

EFFECT OF EXECUTION SALE ON THE SHARE OF DECEASED JUDGMENT-DEBTOR : *See* MITAKSHARA LAW.

EFFECT OF SUDDEN CHANGE OF THE COURSE OF A BOUNDARY RIVER : *See* ACCRETION BY GRADUAL ACCESSION.

ENCROACHMENT : *See* RIPARIAN PROPRIETORS.

EXECUTION.] In execution proceedings under Act VIII of 1859, whether the property attached is an under-tenure or an ordinary leasehold interest only the right, title, and interest of a judgment-debtor can be sold; while by virtue of a sale of a tenure under sect. 59 of Act VIII of 1869, the purchaser acquires it, under sects. 59, 60, and 66, free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the

EXECUTION—*continued*.

holder. *DOOLAR CHAND SAHOO v. IALLA CHABEEL CHAND AND DOOLAR CHAND SAHOO v. LALLA BISHESHUR DYAL* 47

—*See* HINDU LAW. 3.

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GUARANTOR : *See* PRINCIPAL AND AGENT.

HERITABLE RIGHTS OF SLAVE EMANCIPATOR : *See* MAHOMEDAN LAW.

HINDU JOINT FAMILY : *See* ACT I, 1869.

HINDU LAW.] In a partition suit the judgment found that the estate was partible, and that the Plaintiff was entitled to a moiety thereof subject to such charges as might thereafter be found to be binding. Whether or not a decree was framed the judgment was treated in the subsequent proceedings as equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties:—*Held* that this amounted to a partition, and that on the death of the Plaintiff his share passed to his own representatives in the course of succession to separate estate and not by survivorship to his co-sharers. *CHIDAMBARAM CHETTIAR v. GOURI NACHIAR* 177

2. —A Hindu widow, living her husband's minor adopted son, alienated two-thirds of her husband's estate. On the son's death she being heiress to the son, but under authority from her husband, adopted the Plaintiff, while an infant, whose natural father gave him in adoption under an agreement that he would inherit only about one-third of his late adoptive father's estate, being aware or not caring to inquire how the two-thirds thereof had been disposed of. The Plaintiff, two years after coming of age, and his adoptive mother executed an agreement, dated the 19th of August, 1871, and reciting the said alienations, whereby mother and son entered into a family arrangement with respect to the residue.—In a suit by the Plaintiff against his adoptive mother and the alienees of the two-thirds of the estate, to set aside the said alienation and to recover all the estate which was of the adoptive father, alleging himself to have been ousted from the whole thereof, it appeared that the agreement of 1871 was voluntarily executed by him whilst he was aware of his rights and under the advice of third parties, strangers to his adoptive mother:—*Held*, that the agreement of the natural father above mentioned was not void, but was at least capable of ratification when his son came of age; and that the same was validly ratified by the said agreement of the 19th of August, 1871.—*Quare*, can a natural father by agreement before adoption renounce all or part of his son's right, so as to bind that son when he comes of age? *RAMASAWMI AIYAN v. VENCATARAMAIYAN* 196

3. —A purchase by a member of a Hindu joint family with the joint funds is a purchase on account of the joint family, and property so bought may be taken in execution for a joint family debt.—In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere

HINDU LAW—continued.

technical grounds when they find that it is substantially right. *BISSESSUR LALL SAHOO v. MAHARAJAH LUCHMESSUR SINGH* - - - 233

4.—The ordinary Hindu law of inheritance is to be applied to Jains, in the absence of proof of special customs and usages varying that law. *Sheo Singh Rai v. Mussumut Dakho and another* (Law Rep. 5 Ind. Ap. 87) approved.—Under the law of the Mitakshara a daughter's estate inherited from the father is a limited and restricted estate only and not stridhun. Upon her death the next heirs of her father succeed thereto. *CHOTAY LALL v. CHUNNO LALL* - - - - 15

HINDU WILL.] A Hindu testatrix, after creating a charge upon the property, the subject of her will, for the expenses of various religious acts and ceremonies, directed that "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom;" and, further, that "this property of mine will not be liable for the debts of any person. Non will be able to transfer it. None will have the rights of gift and sale":—*Held*, that the former direction amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, the share of each member being capable of being ascertained and of being attached in execution by his creditors; and that the latter directions, being inconsistent with the interest given, were wholly beyond the testatrix's power, and must be rejected as having no operation. *ASHUTOSH DUTT v. DOORGA CHURN CHATTERJEE* - - - - 182

HOUSES IN LUCKNOW: *See* LORD CANNING'S PROCLAMATION, EFFECT OF.

IMPLIED TRUST: *See* ACT I OF 1869.

INCONSISTENT CONDITION: *See* HINDU WILL.

INHERITANCE: *See* HINDU LAW. I.

JAGHIRE GRANT OF, BY THE EAST INDIA COMPANY.] In 1800 a sunnud was granted by the *East India Company* to *N. K.*, which contained the following provision:—"Under these circumstances it has appeared incumbent and proper, in the view of the chief authority (Hoozoor), that some suitable provision should be made as a subsidy for the expenses of *N. K.* and his descendants; that is to say, by reason of close relationship, and being descended from the same ancestors as those of the Nawabs of the maritime city of *Surat*. Therefore this has been settled by the instrumentality of the Governor, as follows: *N. K.* with his children or descendants after the deduction of the income of the jaghire according to the particulars given at the foot hereof, that is now in the possession of *N. K.*, shall receive from the Company's Government the sum of Rs. 24,000 per annum by four equal instalments. Hereafter should it be necessary for the Government to resume the above-mentioned jaghire, given on account of maintenance or otherwise, the amount of the income thereof shall be received by the above-mentioned Khan and his children or descendants from the Treasury of the Company." *M.*, a grandson and successor of *N. K.*

JAGHIRE, GRANT OF, BY THE EAST INDIA COMPANY—continued.

mortgaged some of the mehals comprised in the sunnud, the rents of which were thereafter collected by the mortgagee, and subsequently by the Government.—In an action brought after *M.*'s death against *F.* (his sister and successor), the Government, and certain descendants of *M.*'s sisters, for payment of the balance due upon the mortgage, it was contended that *M.* had only a life estate in the mortgaged mehals:—*Held*, that on the true construction of the sunnud, and having regard to its objects and terms, each of the descendants of *N. K.* who took the jaghire, took it for life only.—A jaghire must be taken *prima facie* to be an estate for life. *GULABDAS JUGJIVANDAS v. COLLECTOR OF SURAT* - - - 54

JIANS. *See* HINDU LAW, 4.

LIABILITY: *See* PRINCIPAL AND AGENT.

LIMITATION.] A suit for maintenance and arrears under a will is not barred after the expiration of twelve years from the testator's death under Act XIV of 1859, sect. 1, sub-sect. 13, unless the will which confers the right thereto also creates in favour of the Plaintiff a charge on the inheritance of the testator's estate.—By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled. *NARAYANRAO RAMCHANDRA PANT v. RAMABAI* - 114

—*See* ACT IX OF 1871.

—*See* LORD CANNING'S PROCLAMATION, EFFECT OF.

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LORD CANNING'S PROCLAMATION, EFFECT OF.] By Lord Canning's proclamation of the 15th of March, 1858, all the proprietary rights in the soil of *Oudh* were confiscated; and therefore in any suit to recover a mouzah situated therein, the Plaintiff must shew a title acquired within twelve years previously by some grant or proceeding of the Government subsequent to that proclamation.

—As to the effect of Lord Canning's proclamation and of Sir James Outram's proclamation, dated the 22nd of March, 1858, with reference to houses in *Lucknow, quaere*. But it appearing in reference to the houses in suit that it was the intention of the Government to abandon altogether the confiscation, and to leave the former owners to their rights in the same way as if there had never been any confiscation:—*Held*, that on a plea of limitation by Defendant in ejectment, alleging possession prior to the proclamations, the issue must be tried and determined in the same manner as if there had never been any confiscation at all.—Issues settled accordingly, and case remanded. *PRINCE MIRZA JEHAN KUDR BAHADUR v. NAWAB AFSUR BAHU BEGUM* - - - - 76

—*See* CONFISCATION IN OUDH (EFFECT OF).

MADRAS ACT VIII OF 1865, s. 3: *See* REGISTRATION.

MAHOMEDAN LAW.] Assuming that by the law of Willa the emancipator of a purchased slave is entitled to succeed and take the property of which such slave dies possessed or entitled, to the

MAHOMEDAN LAW—continued.

disinheritance of her own natural heirs; such right of inheritance is taken away by Act V. of 1843, s. 3, which was in force at the date of the emancipated slave's death, *i.e.*, when the succession opened.—Act V of 1843 is a remedial statute, entitled to the widest operation which its language will permit. **SAYAD MIR UJMUDIN KHAN VALAD MIR KHAMRUDIN KHAN v. ZIA-UL-NISSA BEGAM** - - - - - 137

MALIKANA : *See* OUDH ESTATES ACT, 1869.

MITAKSHARA LAW.] An *ex parte* decree for money having been obtained against a Hindu governed by the Mitakshara, upon a bond whereby he had mortgaged his ancestral immoveable estate, the same was attached. Prior to the execution sale the judgment-debtor died, and his infant sons and co-heirs, on filing a petition of objections, had been referred to a regular suit.—In a suit after the sale by the said infants against the execution creditor and the purchasers, for the adjudication of their right to and confirmation of possession in the property sold, and to have the mortgage bond, the *ex parte* decree, and the execution sale set aside, it appeared that the father's debt had been incurred without justifying necessity:—*Held*, that as between the infants and the execution creditor, neither they nor the ancestral immoveable property in their hands was liable for the father's debt.—*Held*, as regards the purchasers, that they having purchased after objections filed by the Plaintiffs, must be taken to have had notice, actual or constructive, thereof, and therefore to have purchased with knowledge of the Plaintiffs' claim and subject to the result of the suit to which they had been referred.—*Held*, as regards the judgment debtor's undivided share in the estate sold, that whether or not his own alienation was valid by the law as understood in *Bengal*, it was capable of being seized in execution, and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale. **SURAJ BUNSI KOER v. SHEO PERSHAD SINGH** - - - - - 88

—*See* HINDU LAW. 4.

MORTGAGE OF ANCESTRAL ESTATE BY THE FATHER : *See* MITAKSHARA LAW.

OUDH.] In a suit (1870) to redeem a usufructuary mortgage, dated 1846, of a talookdari interest, with all its incidents, it appeared that most of the villages comprised therein were held by third persons under various birt tenures, valid and subsisting at the date of the mortgage, but that some of them were, in or before 1849, purchased by the mortgagee, who at the summary settlement after Lord Canning's proclamation was allowed to engage for all the villages, and to hold them as a talook, subject to rights of sub-settlement.—It appeared also, according to a settlement circular issued in *Oudh* on the 29th of January, 1861, that under the nuwabi, birt tenures were presumably carved out of the talookdar's estate; that they were held under him upon terms vary-

OUDH—continued.

ing according to the terms of the particular patta or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place, malikana was payable to the talookdar; that they were sometimes resumable, and when resumed, would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the talookdar and the birtias; but that birts still subsisting entitle their holders to sub-settlement under the *Oudh Sub-settlement Act*, 1866.—It appeared also that the mortgagee, availing himself of his position as talookdar under the mortgage, had purchased the birts in question in this suit for an apparently inadequate sum, and had treated them as merged in the talook, engaging for them as talookdar and not as birtia, and taking no steps to keep them alive as distinct sub-tenures for his own benefit:—*Held*, that, under the peculiar circumstances of the case, the mortgagor was entitled, according to equity and good conscience, and consistently with English law, upon paying the original mortgage money *plus* the purchase-money of the birts, to redeem the estate as now enjoyed by the mortgagee. **RAJAH KISHENDUTT RAM v. RAJAH MUMTAZ ALI KHAN** - - - - - 145

OUDH ESTATES ACT, 1869.] In a suit against a talookdar (originally for the direct settlement of superior proprietary right but subsequently) for a sub-settlement of a sub-proprietary right in four villages (portion of the talook), it appeared that the Plaintiff became mortgagee thereof and of birt zemindary rights therein on the 4th of March, 1856 (*i.e.*, after the annexation of *Oudh*), for four years with possession: that on the 4th of June, 1857, a summary settlement was made with him only up to the time fixed for the redemption of the mortgage; that in 1859 the mortgagor's talook having been confiscated was granted to the Respondent, and the Plaintiff dispossessed in his favour. It appeared also that the transfer to the mortgagee, according to the true construction of the mortgage deed, and having regard to the intentions of the parties, was merely of a sub-proprietary right:—*Held*, that the Plaintiff was entitled to such sub-settlement; but without prejudice to the Respondent's right (if any) to malikana at not less than 10 per cent. after the Plaintiff's interest had been perfected by foreclosure.—It is not essential to the enforcement of the rights of one who would otherwise be a subordinate zemindar that the talookdar should have some pecuniary interest in the sub-tenure, or that the zemindar should be bound to pay some substantial rent to his superior.—*Quare*, whether even if this mortgage did not confer a strictly sub-proprietary interest, a sub-settlement thereof could nevertheless be made.—A Plaintiff seeking by his plaint a direct settlement of a superior proprietary right may modify his claim to one for a sub-settlement of a sub-proprietary right.—*Widow of Shunker Sahai v. Rajah Kashi Pershad* (Law Rep. 4 Ind. Ap. 198) approved. **GOURI SHUNKUR v. MAHARAJAH OF BULRAMPOR** - - - - - 1

PARTITION : *See HINDU LAW.* 1.

PETITION TO SUE IN FORMA PAUPERIS IS A PLAINT FROM THE DATE IN WHICH IT IS FILED : *See PRACTICE.*

PRACTICE.] On the 20th of February, 1873, a petition was presented in the *Meerut* Court setting out all the particulars required in a plaint, and praying *bona fide* that the Plaintiff might be allowed to sue *in forma pauperis*, and was rejected. It was subsequently filed in the *Delhi* Court, which, on the 14th of April, 1873, ordered that the Plaintiff's suit be admitted *in forma pauperis*, but the High Court of the *Punjaub* directed "that the plaint should be returned to the Plaintiff, with instructions that he should present it to some Court in the *North-West Provinces*;" and eventually, on the 19th of July, 1873, the *Meerut* Court ordered "that the case be brought on the file and numbered." Questions having been raised whether the finding of pauperism in the *Delhi* Court availed in the *Meerut* Court, the Plaintiff on the 27th of November, 1874, paid the proper stamps into Court.—*Held*, that the petition of plaint filed and numbered on the 19th of July, 1873, although so much thereof as asked to be allowed to sue *in forma pauperis* was given up when the stamp fees were paid into Court, must be considered as a plaint from the date on which it was filed, and not, as the High Court held, from the date on which the stamps were paid.—*Quære*, whether the High Courts of the *North-West* and the *Punjaub* had power under Act VIII of 1859, ss. 11, 12, 13, to transfer the suit from the *Delhi* Court to the *Meerut* Court in the same position in which the suit stood before it was transferred, so as to import into the suit when filed in the latter Court the finding to which the former had come upon the issue of pauperism.

STUART SKINNER ALIAS NAWAB MIRZA v. ORDE [126]

PRESUMPTION: *See ARTIFICIAL WATERCOURSE*

PRINCIPAL AND AGENT.] In a suit to recover Rs. 14,000, which the Plaintiffs alleged that they had paid as guarantors of the Defendant, being the loss sustained by his vendors in consequence of the fall of the price of certain cotton sold, it appeared that, by a local custom, the Defendant, as a stranger in the locality of *N.*, could only trade through a resident merchant, the name of whom is by the custom entered as principal in the transaction, to whom the credit is given, and with whom the final settlement of the transaction is effected as the "arath" of such stranger; that the Defendant made extensive transactions in *N.* through the Plaintiffs, representing them as his "araths," and delivered to them "panris," or memoranda of the transactions, according to the custom; that in respect of the transaction in question the Defendant did not deliver a panri to the Plaintiffs (though he had made use of their names) and that the Plaintiffs had represented to the vendors that, not holding a panri, they could not render themselves responsible, but that on reference to a punchait, it was decided that the Plaintiffs ought to pay, and they did pay, the said Rs. 14,000 to the vendors:—*Held*, that the Defendant was liable. He had the authority of the

PRINCIPAL AND AGENT—*continued.*

Plaintiffs to use their name, had so used it with their concurrence, and had thereby authorized the payment as aforesaid by the Plaintiffs, who according to the custom were undoubtedly liable to the vendors. **SAMEER MULL AND CHUNDER MULL v. CHOGALALL** 238

PURCHASE WITH JOINT FUNDS: *See HINDU LAW.* 3.

PURCHASE BY MORTGAGEE OF BIRT TENURES: *See OUDH.*

PURCHASER AT EXECUTION SALE WITH NOTICE OF CO-SHARER'S CLAIMS: *See MITAKSHARA LAW.*

PUTTAH LEASE: *See REGISTRATION.*

RATIFICATION: *See HINDU LAW.* 2.

REGISTRATION.] A document professing to be a lease, but unregistered, was granted by a zemindar to the Defendant's father, its terms being "In consideration of the assistance you have rendered to the zemindary, you requested that village *A*, should be leased to you for forty years, fixing a favourable poruppu. The said village," found to be of the value of Rs. 1,700 per annum, "has been accordingly leased to you for forty years at Rs. 400 per annum. You shall therefore raise the required crop and enjoy; and agreeably to the kararnama you have given, you should continue to pay the fixed poruppu according to the instalments of kist year after year":—*Held*, that this document is not a puttah within sect. 3 of *Madras Act VIII of 1865*, and not being excluded from the operation of *Act XX of 1866*, sect. 17, was inadmissible in evidence and did not affect the estate.—Sect. 3 was not intended to apply to all cases of persons holding under others, but directs that where there is an existing relation of landlord and tenant, the landlord shall in that case grant a puttah to his tenant. **RAMASAWMI CHETTI v. THE COLLECTOR OF MADURA** 170

RE-GRANT OF CONFISCATED ESTATE, EFFECT OF: *See CONFISCATION IN OUDH, EFFECT OF.*

REGULATION XI OF 1825, sec. 4, cl. 1, s. 2: *See ACCRETION BY GRADUAL ACCESSION.*

RIGHTS OF ADOPTED SON: *See HINDU LAW.* 2.

RIGHT OF MORTGAGEE PRIOR TO THE CONFISCATION TO SUB-SETTLEMENT: *See OUDH ESTATES ACT, 1869.*

RIGHT OF MORTGAGOR OF TALOOK TO RE-DEEM BIRT TENURE WITHIN THE TALOOK PURCHASED BY THE MORTGAGEE: *See OUDH.*

RIGHT TO FLOW OF WATER: *See ARTIFICIAL WATERCOURSE.*

RIGHT TO PERFORM RELIGIOUS SERVICES: *See Act VIII of 1859, s. 32.*

RIPARIAN PROPRIETORS.] The Plaintiff and Defendant were proprietors of land and gardens on opposite sides of a tidal creek, which sides were protected by walls. The Defendant, the wall on his side becoming dilapidated, constructed a fresh one, altering its direction, and encroaching five feet upon the bed of the stream.—In a suit for

RIPARIAN PROPRIETORS—*continued.*

possession of land by demolishing the said wall, the Plaintiff alleged that he was entitled to the *solum* on which it was built, that his navigation was obstructed, and that there was a danger of his screw-hous falling down; it appeared however that the Government and not the Plaintiff was the owner of the *solum*, and that the Plaintiff neither claimed nor proved that he was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights:—
Held, reversing the decree of the High Court, that the Plaintiff had failed to shew either *damnum* or *injuria*, and therefore had no right of action.—
Bickett v. Morris (1 H. L., Sc. 47) considered.

KALI KISHER TAGORE v. JODOO LALL MULLICK

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RIPARIAN PROPRIETORS—*continued.*

—*See ACCRETION BY GRADUAL ACCESSION.*

SALE OF RIGHT, TITLE, AND INTEREST : *See EXECUTION.*

TALOOKDAR : *See Act I of 1869.*

TRANSFER OF SUITS : *See PRACTICE.*

USUFRUCTUARY MORTGAGE : *See OUDH.*

WILLA : *See MAHOMEDAN LAW.*

